IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor,
Plaintiff,

vs.

FORECLOSURE CONNECTION and JASON WILLIAMS,

Defendants,

Case No: 2:15CV00653

BEFORE THE HONORABLE DALE A. KIMBALL

JANUARY 9, 2017

BENCH TRIAL
VOLUME I

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I N D E X

WITNESS	EXAMINATION BY	PAGE
SHEFFIELD KEITH	DIRECT BY PRZYBYLSKI	27
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SALT LAKE CITY, UTAH, MONDAY, JANUARY 9, 2017

* * * * *

THE COURT: We're here this morning for trial in the matter of Perez vs. Foreclosure Connection, Inc., and Jason Williams, 2:15-CV-653. Ms. Courtney Przybylski is here for the plaintiff.

Is the plaintiff prepared to proceed?

MS. PRZYBYLSKI: Yes, Your Honor.

THE COURT: Mr. David Ross for the defendants.

08:37:02 Are the defendants prepared to proceed?

MR. ROSS: They are, Your Honor. Thank you.

THE COURT: Thank you. Well, we'll go ahead with opening statements.

MS. PRZYBYLSKI: Your Honor, there are several preliminary matters that I would like to discuss before opening.

THE COURT: All right.

MS. PRZYBYLSKI: The first is that some of the testimony elicited in the course of this hearing is going -- we anticipate will produce facts indicating that there has been contempt of the preliminary injunction. At the conclusion of the proceeding assuming those facts are admitted into evidence, I'd like to ask direction from the Court on how to proceed on that issue.

08:37:38 THE COURT: Well, you'll need to make a motion.

MS. PRZYBYLSKI: (Indicates by nodding head up and down.)

THE COURT: If you think you can prove contempt or you have proven it, make a motion and we'll take it up.

08:37:49 MS. PRZYBYLSKI: Okay.

THE COURT: You can respond to it if she makes it, and we'll take it up.

MR. ROSS: (Indicates by nodding head up and down.)

THE COURT: After the trial.

08:37:56 MS. PRZYBYLSKI: Thank you, Your Honor.

The second issue is that defendants have produced some materials in their final exhibit list that were not earlier produced and were responsive to earlier requests for documents both in the investigation stage and during the 08:38:12 course of the investigation in response to a subpoena and also in discovery.

I'm not sure the purpose of the documents that counsel for defendants intends to use them. And so on that basis, I would like to withhold argument on whether or not 08:38:29 they should be excluded from evidence and whether an adverse inference can be drawn from those documents until I have such time to understand the purpose of admitting those documents.

THE COURT: Mr. Ross, do you want to say anything about that?

08:38:44 MR. ROSS: There are some documents, Your Honor, that were provided to the government. If they're the ones that I think she's referring to, we're going to be making a motion ourselves. We're going to make a motion to dismiss, Your Honor, based upon those documents.

08:39:02 THE COURT: Apparently is your argument they were supposed to be previously produced?

MS. PRZYBYLSKI: Yes, it is.

THE COURT: And were they? Weren't they? And if so, why not?

08:39:11 MR. ROSS: We did produce the documents for Foreclosure, Inc.'s, income tax returns. In fact, the, Sheffield Keith in his investigation had in his hands at the time he made the determination that they had a prime facie case, he had the 2012 and the 2013 income tax returns for 08:39:33 Foreclosure. And since then we have produced tax returns over the course that would have at least covered Foreclosure, and those do not show the requisite $500,000 for them to have jurisdiction over an enterprise.

MS. PRZYBYLSKI: Your Honor, if I may?

08:39:56 THE COURT: Yes.

MS. PRZYBYLSKI: Those are not the documents that I'm referring to. I believe the matter that counsel is addressing goes to your earlier order on the motion to dismiss. The documents that I'm referring to identify job 08:40:06 sites, dates worked, hours worked and total amounts of hours worked. Those are the documents that I'm referring to, specifically the ones counsel has marked as A-11 through 18, A-76 to 78 and A-79 to 80. Records of hours worked and pay records have been requested at least five times over the course of this investigation and in litigation.

08:40:29

THE COURT: When did you get them?

MS. PRZYBYLSKI: Friday.

THE COURT: Mr. Ross?

MR. ROSS: They were produced. We had notified the government, the plaintiff, that we could extract information from QuickBooks. And over the course we had been extracting information from QuickBooks, and that's where this information came from.

08:40:40

THE COURT: Why wasn't it produced before?

MR. ROSS: Well, because it's something that had to be recreated. It wasn't something that was just sitting available in time sheets and things of that nature.

08:40:56

But, Your Honor, if I could proceed with the motion to dismiss, because if, in fact, they don't have the jurisdiction then there was no need to actually produce those documents.

08:41:13

THE COURT: I've already decided against you on the motion to dismiss, haven't I?

MR. ROSS: Not the motion to dismiss under the circumstances that are raised by the income tax returns, Your

08:41:23

Honor.

THE COURT: Ms. Przybylski?

MS. PRZYBYLSKI: As I understand it, Your Honor, we had previously discussed whether or not coverage was necessary under the FLSA, and your order had determined that it was not. Whether or not particular elements of enterprise coverage as to an annual dollar are met in this case falls well within the scope of your earlier order.

MR. ROSS: Your Honor, I'd like to address that.

The earlier order had to do with -- at that given point in time we were, we, the Court, plaintiff, defendants were proceeding as though the defendants had $500,000 of annual income, which is a prerequisite under the statute, and that's 29 USC 203(s)(1)(A)(ii). And under that, it requires that the entity have annual income of at least $500,000 or more annually.

THE COURT: Every year in your view?

MR. ROSS: Every year. And in this case, we if you look at Exhibit 27, A-27 of the defendant's exhibits, that showed there's a list that shows the income for each year. And by the way, Your Honor, we --

THE COURT: How come you're just making this motion now? This trial has been set for quite a while.

MR. ROSS: I know.

THE COURT: And I'm going to try the case this week. You can make your motion to dismiss as part of -- after your evidence.

MR. ROSS: Okay. But it's the -- it goes to the issue of whether or not there could have been impeding a statute that doesn't apply. I think that's relevant. And it also goes to whether you can use now Subsection 15, you said doesn't have to have the commerce clause. As far as -- and although we may disagree with that, that was your ruling. Your not overstating that ruling. We're looking at, and that's 15(A)(3) specifically, and that's the one on retaliation.

As far as the rest of the statutes, the statutes themselves require that the -- that there be -- that the statute applies under the commerce clause. And in this particular case, if they don't have that statute there's plenty of Utah District Court cases basically that indicate that if their $500,000 threshold is not met, then the burden is on the government, on the plaintiff to establish, one of their primary elements they have to establish is that the employees, and I actually submit that includes the Barbers, have to be involved in in commerce individually as opposed to this enterprise definition that the Court referenced the Teresa Darling case the 10th Circuit that basically said that the individual persons working for the company were handling goods. But to get to that point, you have to have 500,000 or more.

MS. PRZYBYLSKI: Your Honor, may I respond?

THE COURT: Sure.

MS. PRZYBYLSKI: If I understand opposing counsel's point correctly, they're not asserting this motion to dismiss with regard to the retaliation claim but as to the interference claim. In your order from August 19th, you stated that because there is no commerce requirements for plaintiff's retaliation and interference claim, the Court denies defendant's motion for summary judgment. However, even if there were commerce requirements, defendants are incorrect that they were arguing that their workers were not handling goods or materials that had moved in interstate commerce.

Your Honor, we can present evidence as to enterprise coverage for the employees at issue in this case. But the only claims that the plaintiffs have brought are as to retaliation and interference, and you've already made a decision on the application of coverage on that circumstance.

THE COURT: All your jurisdictional arguments obviously are preserved.

MR. ROSS: Correct, Your Honor.

THE COURT: Jurisdiction, I can't -- you can't waive it. They're preserved. And you can -- we're going to try the case. We're going to try the case. Your motion is untimely. But you're entitled to preserve your jurisdictional arguments and put on evidence about them.

MR. ROSS: Well, we did include in our answer that we -- that there was a failure to state a claim upon which relief could be granted, and that's the motion we're making a 12(b), and I think it can be made at trial.

THE COURT: And it's provisionally denied.

MR. ROSS: Okay.

THE COURT: All right?

MR. ROSS: All right. Now is that also going to include that they can apply other portions of the statutes, such as the definition of an employee?

THE COURT: What would bar them from that?

MR. ROSS: If they don't have -- if the FLSA does not apply and they have not demonstrated, they still may demonstrate, they would need to demonstrate that the individual employees are in commerce.

THE COURT: I'll rule on those matters after trial.

MR. ROSS: Okay.

THE COURT: All right?

MR. ROSS: Fine, Your Honor. I appreciate it.

THE COURT: But all your jurisdictional positions are preserved.

MR. ROSS: Okay. Thank you.

THE COURT: All right. Now let's go to opening statements, if we can get there.

MS. PRZYBYLSKI: Yes, Your Honor. Your Honor, would you prefer that I make my statement from here or from the podium?

THE COURT: Here.

08:47:34 MS. PRZYBYLSKI: Your Honor, this is a case about taking advantage. It's a case about a man named Jason Williams and his company Foreclosure Connection pressing every advantage that they could to cheat employees out of overtime wages, to silence their employees who complained about wages, 08:47:59 to conceal their actions from Wage Hour investigators and to obstruct the legal process.

The evidence in this case will show that Foreclosure Connection is in the business of flipping houses. It has a number of related entities that engage in the same 08:48:13 business and share the same office space and work force. They are referred to collectively as Foreclosure.

Jason Williams is the owner of Foreclosure. He controls the operations of the business. A number of his family members and friends are also owners and business 08:48:29 partners, but Mr. Williams is ultimately responsible for maintaining the operations of Foreclosure and making its decisions.

To perform the business of Foreclosure, Mr. Williams hires hourly workers. These workers perform 08:48:42 construction services for Foreclosure. Mr. Williams assigns these workers to projects and to locations to perform this work. He sets the hourly rate for each worker, and the rate does not change regardless of the number of hours worked. Given the volume of work that Foreclosure has available, workers frequently work in excess of 40 hours per week. The workers are paid straight time wages and do not receive an overtime premium rate of one and a half times their regular rate.

08:49:02

In the summer of 2015, one worker, Mychal Barber, complained to Mr. Williams about the lack of overtime pay. This was not his only complaint, and he did not complain only to Mr. Williams. Nevertheless, Foreclosure took no action on his complaints. Mr. Barber and his son Mychal Scott Barber next made a complaint to the US Department of Labor. On July 7th, 2015, they came to the Wage Hour offices located here in Salt Lake City and made their complaint to Investigator Sheffield Keith.

08:49:19

08:49:39

On the basis of that complaint, Investigator Keith determined that there were possible violations, both overtime regulations and child labor provisions of the FLSA. The Secretary has not alleged child labor violations or overtime violations in this case, but in the course of the investigation actions taken by Mr. Williams and Foreclosure Connection resulted in violations of interference and retaliation claims.

08:49:56

08:50:18

08:50:37
The next day after the complaint on July 8th, 2015, Investigator Keith went to Foreclosure offices in Taylorsville, Utah, to hold an initial conference with Mr. Williams. The purpose of this conference was to determine whether or not the FLSA, the Fair Labor Standards Act, applies to Foreclosure Connection's business and to determine the working conditions and the relationship of the workers to the company.

08:50:50
During the meeting Mr. Williams denied that Foreclosure Connection had any employees that were subject to the act. After the meeting, Mr. Williams sent a list of workers that he claimed to be independent contractors. Earlier that same day, Mr. Williams told Foreclosure's foreman Jack Erickson to tell the Barbers not to report to the work.

08:51:09
Mr. Erickson later told both Mr. Barber and Investigator Keith that the reason Williams gave for not wanting the Barbers to return to work was because he believed they complained to Wage Hour. Following this, Wage Hour Investigator Keith and Investigator Funes investigated -- interviewed Foreclosure

08:51:30
Connection workers at the job site in Taylorsville, Utah. The purpose of this interview, much like the purpose of the initial conference, was to determine the relationship of the workers to the company, the scope of their work, their working conditions and hours and wages.

08:51:43
The next day, July 15th, and in response to these

08:52:03 interviews, Mr. Williams called a meeting with those same workers at the worksite. During this meeting, Mr. Williams discussed the statement that the worker had made to the investigators and instructed those workers not to respond to further questions of the investigators or to relay the questions to him before answering. He instructed the same workers to complete independent contractor agreements signed after the fact and to lie Wage Hour about when those agreements were signed. Mr. Williams told the workers -- told 08:52:27 the workers that he would not provide pay stubs to them, although that had been the practice of the company for several years prior, and that he would no longer keep or provide such records, suggesting that Foreclosure would conceal or destroy its existing records of time and pay.

08:52:44 Mr. Williams also told the workers that Wage Hour would seek to report them to the IRS and stressed the importance of working together to reconcile their tax filings. He also told the workers that he would purchase liability insurance and set up business entities for them so that each 08:53:02 worker would appear to be in business for themselves.

Williams threatened the workers that they would lose their jobs if they would not help in the investigation telling the workers that his ability and his willingness to continue in business was dependent on being on the same page.

08:53:19 One of the workers, Ezekiel Magana, recorded this

08:53:39 meeting on his cell phone and later provided that recording to Wage Hour. Wage Hour received this recording prior to any documents from Foreclosure Connection, such as independent contract agreements and IRS 1099 tax forms, and for that reason had reason to question the veracity of the documents provided. Wage Hour made attempts to confirm the veracity of these documents by speaking to Mr. Barber and Mr. Magana, both indicating that they did not receive or sign the documents provided.

08:53:58 The termination of the Barbers happened within a day of their complaint to Wage Hour and the same approach -- and the same day as Wage Hour approached Williams about the investigation. The termination resulted in weeks of unemployment for Mychal Scott Barber and months for 08:54:15 unemployment for Mychal Barber before he found equivalent full-time work.

Mr. Williams also terminated Mr. Magana in September of 2016 after Mr. Magana refused to sign another independent contractor agreement. The subject of these 08:54:27 independent contractor agreements is included within the scope of the Court's preliminary injunction. While Mr. Magana was able to find work quickly, his termination violated the terms of that injunction.

At the end of this trial, we ask that the Court 08:54:41 find defendants violated the provisions of the FLSA for interfering with the Wage Hour investigation in this case through false documents and witness intimidation. We also ask the Court find that the defendants violated the anti-retaliation provisions of the FLSA by terminating the Barbers and later terminating Mr. Magana because they anticipated a Wage Hour investigation and did not sign or refused to sign documents prohibited by the injunction.

08:55:02

We ask that the Court issue a permanent injunction against defendant to restrain violations of the FLSA and to also ask that the Court award lost damages -- lost wages and liquidated damages to the Barbers resulting from their unlawful retaliation. Thank you.

08:55:24

THE COURT: Before you sit down, do you have a preliminary response to what you understand Mr. Ross' motion to dismiss is based on?

08:55:42

MR. PRZYBYLSKI: Your Honor, my understanding is that it is based on the annual dollar volume for Foreclosure during the course of the investigation period, which covers 2013 to 2015. I would agree with Mr. Barber that there is one year in that period, I believe it is 2014, that Foreclosure Connection itself shows on the first page of its tax filings for that year a dollar value less than $500,000. However, the tax returns also show sales of properties in that year in excess of $500,000. Additionally, the related entities of Foreclosure Connection, while they do not share bank accounts

08:56:01

08:56:25

share accounting practices and are considered to be related entities. Considered together there's well in excess of $500,000 in annual dollar volume for Foreclosure Connection.

THE COURT: Thank you.

08:56:48 Mr. Ross?

MR. ROSS: Thank you, Your Honor.

Our exhibit, just to go to the last issue that was addressed --

THE COURT: Sure.

08:57:04 MR. ROSS: -- goes to the Generally Accepted Accounting Practices of the CPA that prepared the tax returns, and he puts down the gross income on the -- gross receipts on the front page of each of the tax returns. And we have just simply taken that information that's an accounting practice, 08:57:26 and that shows the gross income by definition. And the gross income for each of those years except for 2013 are -- and that 2012 was also the year that Mr. Sheffield Keith looked at, plus 2013, 2014, 2015 years involved. And two of those years with all of the companies put together, there was I think 08:57:51 significantly less than $500,000. And for the year 2013 where there was on the front page of the Foreclosure loan, it was $841,000, I believe, Your Honor, and the other entities brought it up to a little over to a million 33. Out of that 800,000 was actually money coming from a sell of some 08:58:15 apartment complexes. As the tax attorney, technically they probably shouldn't have been on that tax return because they were actually earned by the partner.

THE COURT: Did you say shouldn't have?

MR. ROSS: Should not have. And so there's -- you know, I haven't really gotten into it that much because I've just got these returns a short time ago.

And the Court did ask why we didn't raise this before. And that was because I had read the narrative report by Sheffield Keith that basically said that he determined it was $500,000 annual income, and therefore, they had one of their elements for the prima facie case, and I guess I sometimes believe what I see. And then I looked into it, and it was incorrect. So I think it's just a matter of fact whether or not there was -- as a matter of fact that the companies did not earn an annual income of $500,000. And it goes to jurisdiction.

This is a case where the investigator for Wage Hour Keith Sheffield -- I mean Sheffield Keith appeared at Foreclosure Connection. And all my dealings with him he's quite the gentleman. He's professional, although I think he missed on the prima facie case issue as far as the 500,000. But other than that, he was doing his job. He appeared at Foreclosure and interviewed, personally interviewed Mr. Williams and concluded that he was the person who was really running the show. And I don't disagree with that. He left an introductory letter with Mr. Williams, and Mr. Williams contacted counsel and began finding out what he can and cannot do.

On the 14th, July 14th -- and that was July 8th in the afternoon that Mr. Keith appeared. And I think it's also relevant for the Court to know, and this is one of the stipulated facts, that it was the morning of July 8th that Mr. Erickson didn't tell the Barbers that they had been terminated, he just told them there was insufficient work and explained why. And you'll hear that on a tape, Your Honor, basically that it was -- based upon the fact that the properties were red tagged, and we provided the exhibit for that. That was for the most part late June, and the properties were -- and they really weren't technically red tagged, but they were -- they wouldn't allow certain work to be done on the properties, so that slowed down the work that Foreclosure had at that time. So that was a legitimate reason to, hey, you're not -- we don't need you right now.

Also in this particular case, and I don't want to jump around, but on June 29th, Mr. Williams had basically told Mr. Barber, Mychal Barber, Jason Williams nor anybody the Foreclosure ever dealt with Mychal Scott Barber, but they dealt with Mychal Barber, and informed Mychal Barber that they didn't need his services anymore. I say "they," Jason Williams. He informed Mr. Garcia he wasn't going to be around anymore.

I think there's some circumstantial evidence that will bolster the fact that these things happened. For instance, the work assignment in the part of the I guess claim that Mr. Williams is the employer is that he would assign jobs to Mr. Barber and everyone else. And in other words, Mr. Barber would call in, you know, where do you need me today, and what work needs to be done?

After the July 1st, there was no assignments. In fact, Mr. Barber appears on a site they call the Firehouse. And on that site, he does about 30 minutes worth of work and then doesn't work on the 2nd, a day that everybody else worked on. The individual workers or employees were informed that the office was closed on July 3rd, 2015, and that there wasn't going to be any work that day. And the office would be closed, et cetera, and you need to pick up your checks on the 2nd. It's evidence of the fact that they were aware of it, the Barbers. Mychal Scott Barber, the son, came to pick up his check on Thursday, the 2nd. Now, what's important the checks were always picked up on a Friday. But on this particular one because of the July 4th holiday, they closed the office on the 3rd.

Mr. Barber wasn't assigned to some work after that date after he's been let go by Mr. Williams, but he shows up on July, the 3rd, and he's turning these hours into the office that he claims he worked on July 3rd at the Firehouse even though it was a day off and wasn't supposed to work and he wasn't assigned to work there. He still shows up or at least allegedly shows up. He puts in about seven hours that day, I believe, the records will show.

09:04:21

He also claimed that he worked on July 6th, 2015, at the Firehouse. We have reason to believe that he actually did do some work there because there was some work that was assigned to Jack Erickson, who will be testifying, and Jack Erickson will testify that he was the one assigned to do the work. But some of it was done, so he obviously did some work.

09:04:42

As for July 6th, we have evidence that on July 6th Mr. Barber claims that he and his son were -- well, I shouldn't say he claims, but his son made his own claim that they worked 10 1/2 hours that day. Brandon Gilleland was there for most of the day. Did not see the Barbers. Mr. Erickson was there for almost the entire day, and he didn't see the Barbers there.

09:05:04

We believe that they turned in false records. We also know that -- we believe we can show that Mr. Barber, Mychal Barber, had purchased some materials, unauthorized purchased some materials at Home Depot using Jason Williams' account. Jason Williams doesn't do work himself. And that those materials, this is after he was let go, were for the

09:05:26

09:05:52

purpose of his doing work at a job site that we believe he already had a job for. And that's on July 8th. He was working at a Wingers, and he did some work.

He also claims that they were there at the place called Lambourne. And for the Judge's edification, they named the work sites after the street that the properties were on. So at the Lambourne site they claim they worked time there in the morning for about two and a half hours and suggested they came back. But there's no evidence of that, and people who were there didn't see them there.

So we question a lot of time hours they put in. But the very fact that he already has work set up on the 8th and is doing the work on the 3rd and the 6th, well, he didn't do it on the 6th. We know that. But they claim that he did some work on the 3rd, a holiday, we just think is a ruse to try to get in some time after he's been let go. And we think that the fact that they didn't show up on the 2nd of July and the fact that they claimed they showed up on the 3rd and 6th and we know they didn't show up on the 6th is pretty I think damning evidence relative to the fact that they had been let go prior to the filing of the complaint. So we believe that's not pretextual.

And the incident happened on the 15th which followed Mr. Sheffield Keith and also a Hector Funis and also another investigator for the Wage Hour appeared at the site, at -- it was Marsha Brook, that's the address, Circle. And they showed up there, and they interviewed the employees or workers. And at that time Mr. Williams really didn't know too much that was going on. This is what he informed me. Basically that he was upset that the investigators, keeping in mind, Your Honor, that the statute has a criminal element on it, too, that these investigators had shown up on private property without the consent of the owners and had gone on and spoken with all of these employees. And I understand they should have the ability to talk to these people so that they can determine whether or not they have jurisdiction. So I understand that portion. But Mr. Williams was all excited about it, thought they should have contacted him and got his consent and so forth.

He is -- so he looked at it as, you know, encouraging by the government. And so he went to the site on the 15th, and a lot of what counsel has explained we don't deny. We admitted it. We admitted it in our pretrial disclosures. We admitted it at the time to the government that he had gone to the site and said some things that he shouldn't have. He got counsel after that meeting and instructed me to stipulate to a preliminary injunction so that -- and he wanted to do right after that, Your Honor.

The government's bringing up this issue about Exequiel indicating that he was terminated. And the crux of that is that the order that the Court entered and we stipulated to indicated that if any person --

THE COURT: Now you're talking about the injunction; right?

09:09:58 MR. ROSS: Yes. The injunction, sorry, Your Honor. And the injunction that we agreed to required Foreclosure to notify the Department of Labor if any person is terminated for any reason. And we included workers and employees, so that's not the issue. The issue is we would have to notify. We will 09:10:21 prove that Exequiel was not fired and proceed to do that.

As far as --

THE COURT: I assume you deny that your people have violated injunction?

MR. ROSS: Correct, Your Honor. And, you know, we 09:10:42 weren't maybe perfect in getting all the documents to them. I would send over the request. And we gave them about 148 pages of documents, and without going through each and every one of those documents and analyzing them and spending a lot of time I'm not sure if we did or did not get everything to them.

09:11:02 We did make some requests from the plaintiff for documents, too, Your Honor, and to date we have never received those. For instance, we asked for the liability insurance policy for Mr. Barber as a general contractor. He admitted he had one, but we never received that. We also made a request 09:11:24 for some other documents including the -- Mr. Keith indicated that he was going to provide me with the records up to that date of the calculations for their claim of overtime wages for the so-called employees. And that was on May 6th of 2016. And we never -- and we requested them, and he was going to provide them but never received. And that's, you know, that's being picky. I mean, that's -- they made, the government made a lot of requests to us, and I hope we tried, at least we tried to respond to those.

09:11:50

So I think the only thing from the date of the stipulated injunction is this claim on Exequiel, and we're going to establish that he was not terminated and that, therefore, there was no reporting requirement.

09:12:10

THE COURT: Anything else, Mr. Ross?

MR. ROSS: No. That's all I have, Your Honor. Thank you.

09:12:27

THE COURT: All right. Thank you.

You may call your first witness. Now I don't know, of course, who these people are, and you have witness exclusion. Obviously you have a client representative and --

MR. ROSS: Yes.

09:12:41

THE COURT: And they can stay, of course, or he can stay. But if anyone else is here that's going to testify, they have to be excluded until their testimony is completed, except your first witness. Who is your first witness?

MS. PRZYBYLSKI: Your Honor, we call Investigator

09:12:59

Sheffield Keith as our first witness.

THE COURT: All right. Let's not let him get out of here, then.

Come forward and be sworn, please, right here in front of the clerk of court.

09:13:12

THE CLERK: Please raise your right hand.

SHEFFIELD KEITH,

called as a witness at the request of Plaintiff,

having been first duly sworn, was examined

and testified as follows:

09:13:25

THE WITNESS: I do.

THE CLERK: Thank you. Please take the witness stand.

There are witness rooms.

09:13:44

THE COURT: There are witness rooms they can wait in if they want to.

THE CLERK: So defendants are over on this side and plaintiffs on that side.

THE COURT: Hang on a minute until we get that straightened out.

09:13:53

MR. ROSS: Excuse me, Your Honor.

THE COURT: It probably would be better if they didn't get in the same room together.

MR. ROSS: Never thought about that.

09:14:17

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: Sheffield Keith. S-H-E-F-F-I-E-L-D. Keith, K-E-I-T-H.

THE CLERK: Thank you.

09:14:31 THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. PRZYBYLSKI:

Q. Mr. Keith, what do you do for a living?

A. I am an investigator for the Wage and Hour Division of the US Department of Labor. 09:14:43

Q. To make sure that the Court can hear you, can you pull the microphone a little bit closer to you?

THE COURT: Yeah. Speak right into it.

THE WITNESS: Sorry about that, Your Honor.

09:14:54 Q. BY MS. PRZYBYLSKI: How long have you been an investigator for the Wage and Hour Division?

A. Roughly five and a half years.

Q. What are your job duties as a Wage Hour investigator?

09:15:04 A. I conduct investigations that are assigned to me by my managers. And these investigations are conducted under the acts of the Fair Labor Standards Act, the Family Medical Leave Act, the Davis Bacon Act and others.

Q. What's the general subject matter of Wage Hour investigations? 09:15:27

A. Labor, wages, payment of wages overtime, minimum wage, correct payments under the Davis Bacon Act.

Q. In your position as a Wage Hour investigator, what types of training have you received?

09:15:48 A. It's extensive. We first get training from our managers and colleagues in the office. Then we -- in the first year usually we are sent to Basic One, is what we call it. It's a three-week training course that is carried out by the Department of Labor, the Wage and Hour Division, in that 09:16:14 first year when we get back. And pretty much ongoing there is, there's training from the managers, from your colleagues who are senior than you and others who may be good at a certain topic.

In the second year usually we attend Basic Two, is 09:16:33 another three-week training course. And there are also a lot of training seminars that are available online and that we are required to participate in online and conference calls, agendas, meetings, things like that.

Q. What training have you received specifically with 09:16:54 regard to the Fair Labor Standards Act?

A. Again, I received a lot of training from my managers, from colleagues who are senior to me, training seminars available online and given to us on conference calls. Course at training, briefs that are prepared by my colleagues, 09:17:21 and I mentioned Basic One. That is almost exclusively, the three-course is almost exclusively to train us on the implementation and the rules and regulations of the Fair Labor Standards Act and how we should enforce it.

Q. Having received training with regard -- if I say FLSA do you understand that to mean --

A. Yes.

Q. Sorry. Let me ask the question in full, and I'll give you an opportunity to answer.

If I say the Fair Labor Standards Act, do you understand what I mean if I convert that to the acronym FLSA?

A. Yes.

Q. What portions of the FLSA have you been trained in?

A. Well, we are taught -- there are basically four components to the Fair Labor Standards Act; child labor, recordkeeping, minimum wage and overtime.

Q. And in addition to those components, are there elements that address whether or not the FLSA applies to any particular employer?

A. Yes, absolutely.

Q. And what training have you received with regard to those elements?

A. Those elements are specifically covered in Basic One, and we go over them routinely both in, you know, first time trainings and even refresher classes and briefings that we get. It's something we cover quite a lot.

09:19:03 09:19:19 09:19:42 09:20:01 09:20:18

Q. What elements must be met for coverage of the Fair Labor Standards Act to an employer?

A. Yes. The training that I received is that there are two ways that there can be coverage under the Fair Labor Standards Act for an employer. One is enterprise coverage, and then we've got also individual coverage. If enterprise coverage is not met, we then look to see if there's individual coverage for the employees. Do you want me to go on exactly what it is?

Q. What is enterprise coverage?

A. Okay. Thank you. Enterprise coverage is, what needs to be met there is in any four quarter period, preceding four quarter period, an employer, their annual dollar volume has to be over $500,000, at least $500,000 in order for the Fair Labor Standards Act to apply under enterprise coverage for the following four quarters.

Q. What is -- I'm sorry.

A. Sorry. And also at least two employees have to have handled goods that have moved in interstate commerce.

Q. What is individual coverage?

A. Individual coverage would be, it's determined on a weekly basis. We look at each individual employee, and we look to determine if these employees have engaged or are engaged in interstate commerce. They would have to be actually engaged in interstate commerce. A good example for that is a credit card processing. That comes up a lot. So if an employee processes a credit card Wednesday, let's just say, then for that entire week the Fair Labor Standards Act applies to that employee under individual coverage.

09:20:42 Q. Do you have to determine either individual coverage or enterprise coverage before you can investigate an employer?

A. Before we can investigate? It's one of the first things we do in the investigative process and even before sometimes if there's a complaint. We do try to make sure that

09:21:02 there is individual enterprise or individual coverage, yes, coverage under the Fair Labor Standards Act.

Q. Even if there is not individual or enterprise coverage under the Fair Labor Standards Act, does that hinder your ability to investigate to make that determination?

09:21:18 A. Could you repeat the question?

Q. Sure. Let's see if I can make it a little simpler.

Even if an employer is ultimately determined not to have individual or enterprise coverage, do you as an investigator still have authority under the act to investigate

09:21:34 the company to make that determination?

A. Yes, we do. That's my understanding, yes.

Q. And do you know what section specifically that refers to?

A. I want to say Section 203, but I could be wrong

09:21:48 there.

Q. Are there other sections of the Fair Labor Standards Act where it's not necessary to determine whether or not individual coverage or enterprise coverage applies in order for a violation to occur?

09:22:02 A. My understanding is that yes.

Q. And what section is that?

A. Section 1583 is one of them.

Q. And what is Section 1583?

A. It prevents retaliation against an employee for mentioning or trying to pursue his rights that should be granted him under the Fair Labor Standards Act.

09:22:15

Q. What is your understanding of why individual coverage or enterprise coverage would not apply to Section 1583?

09:22:30 A. My understanding is that because it's an employee right that they have a right to not be discriminated against for trying to exercise their rights as employees under your basic government labor regulations.

Q. How many FLSA investigations have you participated in?

09:22:50

A. I don't have an exact figure, but I'd say roughly about 150.

Q. And how many FLSA retaliation cases under Section 1583 have you participated in?

09:23:04 A. This is the first one, although peripherally I was involved in a couple of other possible 1583 actions. But this is my first full 1583 investigation.

Q. And when you say full 1583 investigation, what do you mean by that?

09:23:21 A. Specifically we were looking at section -- this investigation was brought on after the initial investigation which was for possible overtime violations. This investigation, a separate investigation, I should say, was started and carried out to determine whether or not the rights 09:23:45 of the employees Mr. Barber, Mychal Barber and Mychal Scott Barber, were violated under Section 1583 under the Fair Labor Standards Act.

Q. Is the overtime investigation still ongoing?

A. Yes, it is. It's open. Yes.

09:23:59 Q. What training have you received particular to Section 1583 in retaliation claims?

A. It's one of the sections that's covered in our training. I've received training in Basic One. We've also received training through general briefings that we receive 09:24:20 from managers and colleagues.

Q. How did you come to investigate Foreclosure Connection in this case?

A. It would be what we would refer to as a complaint driven case. It began with both of the Barbers, Mychal Barber 09:24:39 and Mychal Scott Barber, coming into the Wage and Hour office here in Salt Lake City and filing a formal complaint against their employer.

Q. Can you identify the relationship between Mychal Barber and Mychal Scott Barber?

09:24:52 A. Yes. As far as I know they are father and son.

Q. Who is the father and who is the son?

A. Mychal Barber is the father, and Mychal Scott Barber is the son.

Q. What allegations were made in the course of their

09:25:06 complaint to Wage Hour?

A. Their basic complaint was that they were not paid overtime, that they regularly were asked to and did work over 40 hours in a week, and their pay remained the same. They did not receive a halftime premium for any hours worked over 40 in

09:25:24 that week. And in addition to that, once I started asking some questions, it came to light that there were some potential child labor violations including Mychal Scott Barber possibly allegedly using power tools and things like that which could have been a violation of the child labor laws.

09:25:45 Q. How old was Mychal Scott Barber at that time?

A. I believe he was 17.

Q. You mentioned circumstances suggesting overtime violations. What does the Fair Labor Standards Act require with regard to overtime?

09:25:57 A. Yes. With regard to overtime, the employer must keep records of how many hours an employee works. And once those hours reach 40 hours in any given workweek, the established workweek, any hours after that have to be paid at straight time plus a halftime premium.

09:26:18 Q. Straight time, what is that?

A. Straight time is the regular established rate that an employee pays an employee for hourly work. And in this case straight time would be -- well straight time is always paid.

09:26:36 Q. What was the hourly rate that Mychal Barber reported being paid?

A. I believe it was $25 an hour.

Q. What was the hourly rate that Mychal Scott reported?

09:26:50 A. I want to say it was $10 an hour. I could be wrong on that, though. I'm sorry. I apologize for that.

Q. In your interview with the Barbers, what information did you obtain that suggested the FLSA might apply to Foreclosure Connection?

09:27:12 A. Yes. They gave a description of the type of work that they did and the business, the business that the employer was engaged in. And at that point, I had to ask a couple of questions of them. They estimated that the number of houses that they worked on and the amount of money put into these

09:27:38 houses. And based on that, I extrapolated and I came to the conclusion that at least there was significant evidence that there could be enterprise coverage and also there could also be a possibility of individual coverage for some employees of the firm.

09:28:00 Q. What evidence did the Barbers provide of possible individual coverage?

A. Well, they did mention that they used tools and many of which name brands, which as an investigator you come to know that a lot of these tools are not made in the state of

09:28:24 Utah. They are also working with a lot of construction materials that also in the course of being an investigator one comes to gain the knowledge that a lot of these construction materials are not necessarily made in Utah. So they're definitely handling goods that have moved in interstate

09:28:45 commerce. And they also said individual coverage. I mean, there are employees. There's an office, and the office has computers and they do accounting and things like that. Possible Internet, possible interstate commerce there.

Q. How did you prepare for your investigation of

09:29:09 Foreclosure?

A. I gathered the usual Department of Labor literature that we hand out at every investigation to every employer. I filled out, I wrote up an appointment letter which indicated steps that we're going to be taking in the investigation, and

09:29:29 it also requested certain items of Mister -- of the employer.

And I gathered the address of the employer, and I booked transportation, our government car, to go out there. And I made an appointment on my itinerary. Because child labor was a potential, the investigation had to move quickly. So I made arrangement for the next day to go out to the employer.

09:29:55

Q. Why did the investigation have to move quickly if there was a child labor allegations?

A. Again, just general enforcement and the expediency. I mean, that's usually determined by my managers and in consultation with my managers. But typically if child labor is involved or a child labor violation is involved, we will go out pretty much as soon as possible. Because of the nature of a child labor violation, a potential for a minor to get injured, we usually go out as soon as possible.

09:30:17

09:30:48

Q. When did you approach Foreclosure Connection about this investigation?

A. I believe it was on the 8th about, I got there about 10:00 a.m.

Q. Where are Foreclosure Connection's offices?

09:30:58

A. It's in Taylorsville. The exact address of their office escapes me at the moment. I apologize for that.

Q. When you arrived, what did you do?

A. I identified myself. I showed my credentials to the individual who was sitting at the front desk. And I explained briefly why I was here. And I asked to speak to the

09:31:18

owner or manager of the establishment.

Q. During your interviews with the Barbers, did they identify the owners or managers of Foreclosure Connection?

A. Yes. They identified Jason Williams as the owner and in fact the person in charge. They also did tell me that there was some someone else that handled like paychecks and things of that nature and clerical and payroll activities. But they identified Jason Williams as the owner and the person who ran the business.

Q. When you went to Foreclosure's offices and asked to speak with an owner or manager, who did you speak with?

A. Yes. As soon as I identified myself, they said yes, Jason Williams was there and Jason Williams would speak to me. And they asked me to just hold on for a couple of minutes so they could get his attention and see if they could meet with me.

Q. Did you ultimately meet with Mr. Williams?

A. Yes, I did.

Q. What was the substance of that meeting?

A. The substance of that meeting, we refer to these meetings as an initial conference. I presented my credentials first and identified myself, introduced myself. I said, hello. I then produced, I told them why I was there, to conduct an investigation under the Fair Labor Standards Act. I produced the appointment letter, which is sort of a formal document which reflects that an investigation is taking place. It lays out some of the items that are required of Mr. Williams and the employer in these situations where an investigation is taking place. And I sat down, and I proceeded to ask Mr. Williams some questions.

Q. Was anyone else present at that meeting?

A. At the beginning it was just Mr. Williams and me. Later another individual did join us, and I believe it was the son-in-law, although I can't remember his name.

MS. PRZYBYLSKI: Your Honor, I have prepared a binder of exhibits in this matter. Would you prefer that I hand the entire binder to the witness and move for admission of each individual document or hand him one exhibit at a time?

THE COURT: Let's find out.

Do you have any objections to these?

MR. ROSS: I do not, Your Honor.

THE COURT: You do not?

MR. ROSS: I do not.

THE COURT: Why don't we admit all of yours, 1 through 24.

MS. PRZYBYLSKI: Thank you, Your Honor.

THE COURT: And while we're doing that -- so 1 through 24 of Plaintiff's Exhibits, are admitted.

(Whereupon, Plaintiff's Exhibits 1 through 24 were admitted.)

THE COURT: And you had a couple of objections to his.

MS. PRZYBYLSKI: I do, Your Honor.

THE COURT: You mentioned them?

09:34:32 MS. PRZYBYLSKI: Yes. Exhibits A-11 through 18.

THE COURT: Okay.

MS. PRZYBYLSKI: The exhibits that are marked as A-76 through 78, although those individual pages are labeled as A-74 through A-76.

09:34:48 THE COURT: Well, there's a separate A-73 and 75 and separate 76 and 78 on my list.

MS. PRZYBYLSKI: I have to make sure, Your Honor, that the numbering hasn't changed since the last time I had an opportunity to look at these.

09:35:13 THE COURT: 73, 75, list of vendors that are subcontracted.

MS. PRZYBYLSKI: Yeah. My objection is not to that document, but the document that is described as list of jobs, locations and work performed by Mychal Barber from May 7th, 09:35:32 2015, to July 1, 2015.

THE COURT: And then did you have any other objections?

MS. PRZYBYLSKI: Yes, Your Honor. I had objections to the exhibits identified as A-79 through 80.

09:35:50 THE COURT: And your main objection is they were untimely produced?

MS. PRZYBYLSKI: That they were untimely produced, and it's particularly prejudicial to the secretary at this point given that these documents had been requested from the initiated of Wage Hour investigation all the way through the discovery process.

THE COURT: I understand your objection. But arguably they may go to jurisdictional issues that can't ever be waived or ignored. So I'm going to admit them. Do you want to make anymore of a record about that? And it's a bench trial, and there's no jury.

MS. PRZYBYLSKI: Yes, Your Honor. The documents that opposing counsel refer to that go to jurisdiction are the documents identified as Exhibits A-27 to A-52. I don't have a particular objection as to those exhibits. However, these exhibits that I've identified, I'm not aware of the way in which they would go to any of the jurisdictional issues. These are documents that pertained to pay and hours records.

THE COURT: And how are you prejudiced, if they come in?

MS. PRZYBYLSKI: Your Honor, one of the allegations in this case is that Foreclosure Connection has not been forthcoming in its documents to Wage Hour in an effort to interfere with our investigation throughout this process. To the extent these documents are entered into the evidence, I'd like an opportunity to establish that fact and draw an adverse inference from them.

THE COURT: I don't see how you give up that argument if I admit them.

09:37:30 MS. PRZYBYLSKI: I'm willing to concede that point, Your Honor.

THE COURT: All right. So --

MS. PRZYBYLSKI: My concern only was that they not be necessarily be admitted for the truth of the matter

09:37:41 contained in those documents.

THE COURT: Well, I guess I'll have to decide that.

MS. PRZYBYLSKI: Yes, Your Honor.

THE COURT: So all of defendant's exhibits are admitted.

09:37:52 (Whereupon, Defendant's Exhibits A-1 through A-81 were received.)

THE COURT: I guess I'll decide later about adverse and so on.

MS. PRZYBYLSKI: Thank you.

09:37:58 THE COURT: So that's A-1 through A-81 through A-88. The good news is we don't have to fight over all the exhibits. And you can hand him your binder or whatever you want.

MR. ROSS: Your Honor, we do want -- there was only

09:38:15 one, and I apologize. Is there an Exhibit 11, which is an audio recording of the July 15?

THE COURT: 11? Yes.

MR. ROSS: Recording? I think there's actually two recordings, if I'm not mistaken. And those are items that we've agreed to everything that was said, Mr. Sheffield Keith's declaration as to the things that were said as to, you know, the IRS threats.

THE COURT: So what is your objection, they're repetitive?

MR. ROSS: They're repetitive.

THE COURT: They probably are, but I'll let them in, anyway.

MR. ROSS: Okay. Thank you, Your Honor.

MS. PRZYBYLSKI: Your Honor, may I approach the witness?

THE COURT: You may.

Q. BY MS. PRZYBYLSKI: Investigator Keith, I've handed you a binder of exhibits that have been marked for identification and admitted into evidence. I would ask you to turn to the document identified under Tab 1. You should also be able to see the document as it's published on the screen in front of you. Am I correct?

A. Yes.

Q. You can see it?

A. Yes, that's it.

Q. What is this document?

A. It's an appointment letter that I provided to Mr. Williams on the day and time that I showed up to hold the initial conference.

09:40:08 Q. And who prepared this document?

A. I did.

Q. Why did you provide this document to Mr. Williams?

A. It's standard operating procedure that we give an appointment letter at the beginning of every investigation we conduct. 09:40:23

Q. Would you summarize the contents of the request for documents made in this letter?

A. Yes. So there are eight items that I requested. Of course, his cooperation is also requested, and that's not one of the eight. 09:40:42 But it's basically the names and addresses and telephone numbers of all -- and there's a little bit more information. Their pay rates and things for all employees who have worked at the business for the last two years. We asked for the names and addresses and telephone numbers of the business owners and any company officers. 09:41:05 We asked for the legal name of the company and any also known as or doing business as, and we ask for the federal employer identification number. We ask for payroll and time records for employees going back for the past two years. We ask for records identifying the annual dollar volume for the firm 09:41:33

going back for three years. And usually it's a tax document that we look at, not for any other reason other than just to establish the annual dollar volume. Birth dates for any employees under 18. I believe that's it. 1099 forms for any independent contractors he may have used in the last two years. That's it.

Q. Let's start with the request for payroll and time records. What is the purpose of requesting those documents for a two-year period?

A. Yes. The purpose of that is to determine whether or not minimum wage and overtime provisions of the Fair Labor Standards Act were met. So we ask for the payroll records going back to two years, and we also ask for the corresponding records of hours worked, which can in many cases be like the timecards that employees punch in and punch out with.

Q. Is there any particular form of payroll records that Wage and Hour limits its request to?

A. Not necessarily. My understanding -- I mean, we always say, you know, payroll, you know, the time records, they can be on any form. Any certain payroll we simply want to find out, we want the records to show how much an individual was paid for a given time so that we can then crosscheck to make sure that those -- if we crosscheck and see how he worked, we can establish if he was paid minimum wage and overtime.

Q. You also mentioned that this document requests 1099 forms. What are those forms?

A. 1099, I don't work for the IRS, obviously. But my information is 1099s establish to an extent how an adult worker was paid. 1099 being that the employer would then, is treating them as an independent contractor and paying these individuals as a business rather than as an employee. And the 1099s would reflect the amount of pay.

Q. In wage hour consideration, are 1099s considered to be dispositive of whether or not a worker is an independent contractor?

A. Dispositive, could you define that?

Q. Sure. In producing 1099s, does that establish definitively for Wage and Hour that a person is an independent contractor?

A. No, absolutely not. That is one of the things we look at, but by itself it would not establish anything.

Q. This letter also requests documents with regard to annual dollar volume of sales for a three-year period. Why is that a request that Wage and Hour makes?

A. That request is to establish coverage under the Fair Labor Standards Act. With those documents, with the annual dollar volume we need to identify and know what it is so we can establish enterprise coverage or determine that there is no enterprise coverage.

09:45:02

09:45:20

09:45:47

09:46:02

09:46:24

Q. What does annual dollar volume cover?

A. Annual dollar volume is, it's identified a couple different ways in the years that I've been at the Wage and Hour. One is money coming in and out the door in the establishment. It could be, it's not necessarily gross revenue, because revenue can reflect annual dollar value. Annual dollar value would be, again, money coming in and out the door through the establishment. The door being the doors of the establishment.

Q. Why did you request a list of employees with their hourly rates and job descriptions?

A. We need to establish going back for two years who has worked there. And a lot of times if we ask employees, hey, did anyone work with you, you know, in the last two years? Can you name them? A lot of times they can't. They can sometimes name a couple people. But in order to figure out exactly who was working at the establishment in the last two years, we ask the employer to provide a list of the employees. And then we usually crosscheck that against the payroll records. And we ask that it contain usually as much information as possible including their hourly rates and their addresses, phone numbers in case we can get in touch with them. Also it should list their position at the company so we can establish whether they'd be exempt or nonexempt.

Q. And when you say exempt, what do you mean?

A. Exempt from having to be paid overtime or in some instances minimum wage. But in this case, it would probably most likely be exempt from overtime.

Q. And that's exempt under the Fair Labor Standards Act?

09:46:39

A. Under the Fair Labor Standards Act, yes.

Q. In addition to presenting a copy of this letter to Mr. Williams, did you undertake any other efforts to convey its contents to him?

09:46:51

A. Oh, yes. We went over each item point by point to make sure that he understood all of the requests.

Q. And what was Mr. Williams response to these requests?

A. Mr. Williams was cooperative. And to begin with, I mean, he said, okay. Yes. He would -- you know, he didn't object to any of the requests. He did -- he wasn't extremely cooperative in terms of the timeframe that I gave him to produce some of these documents. At that point, there was some elevated conversation. Our voices got a little stronger. I wanted these records, you know, as soon as possible. Not necessarily as soon as possible, but I did have a timeframe and I presented a timeframe. I can't remember what it was, a week or two weeks I gave him to produce these documents. And he objected to that saying that it might take longer.

09:47:08

09:47:36

Q. Turn your attention now to Exhibit 2. What is this

09:47:53

document?

A. This is an e-mail that I received from Jason Williams.

Q. And what information is provided in this e-mail?

09:48:21 A. This information here reiterates what he told me verbally, that he didn't have any employees and that everyone who was working on his jobs or his office were either owners or independent contractors. And this is his list of people he has identified as having worked for him. And he has that

09:48:49 list. Some were owners, but importantly to us I believe the question you're trying to get at is it shows the independent contractors on this list.

Q. So this document has a heading in the lower third of the page titled, independent contractors?

09:49:06 A. Yes, it does.

Q. And there's a list of names after that identifying individuals as independent contractors?

A. Yes, ma'am.

Q. And that list continues on to the second page of

09:49:15 that document?

A. Yes, ma'am.

Q. Below the list of individuals, there's also a list of business entities that are identified as independent contractors?

09:49:24 A. Yes.

Q. What was the date that you received this e-mail?
A. I received it on July 8th.
Q. Was that the same day as your initial conference?
A. I believe so, yes.
09:49:46 Q. Other than the information provided in this e-mail, did Mr. Williams provide you any additional information in response to your appointment letter in Exhibit 1?
A. Well, we spoke, and I believe he did answer a couple of my questions. He might have provided some 09:50:06 information such as the employment -- employer identification number, things like that. He did provide me some information verbally, but he did not provide any records at the initial conference.
Q. Were records provided with this e-mail?
09:50:22 A. I don't think so, no.
Q. Looking at the top of the -- rather looking at the bottom of Page 2 of this Exhibit 2, the darker bullet points, does that affect your recollection?
A. The darker bullet points? Oh, I see. Yes. Tax 09:51:00 returns. So did I provide -- did he provide tax returns for 2012, 2013? He did. Again, I mean, off of top of my head whether he gave them at the initial conference, that could be the case, yes.
Q. But ultimately Mr. Williams did provide tax records 09:51:17 for 2013 and 2012?

A. Yes, he did.

Q. Did you have an opportunity to review those tax records?

A. Yes, I did.

09:51:25 Q. What information were you able to obtain from those tax records?

A. Well, those tax records showed and I believe they were three years, it showed an annual dollar volume of less than $500,000 I believe two of the three years that I

09:51:39 requested, and one year it showed a dollar value of roughly $800,000. And there was an explanation that came with that, which was that that was high because he had sold some property in that year.

Q. When you say annual dollar volume for those

09:51:59 records, what figures are you referring to specifically?

A. I believe it would be the gross revenue.

Q. Did those records also reflect property sales for those years?

A. I believe it did. The further records that they

09:52:16 showed, yes.

Q. And in review of those property records, what information did you obtain from them?

A. Well, the property well above with prices well above $500,000 were being sold in each year.

09:52:32 Q. Is the sale of property something that Wage and

Hour considers in determining annual dollar volume?

A. Yes. I considered it to be that, and I referred this to my managers and they also agreed with me, that, yes, it would be annual dollar value in the way we look at what annual dollar volume is.

Q. What was your ultimate determination of annual dollar for Foreclosure Connection during the years covered by your investigation?

A. That it was above the $500,000 threshold. That would mean that the employer would meet enterprise coverage for the entire investigated period along with the two employees handling goods that moved in interstate commerce.

Q. You mentioned in your answer the two employees handling goods in interstate commerce. What do you mean by that?

A. It's one of the requirements for enterprise coverage. $500,000, there has to be $500,000 in annual dollar volume in the preceding four quarters, and at least two employees have to have handled goods that moved in interstate commerce.

Q. Who did you determined handled goods and what goods did that he handle?

A. Yes. All of the employees, all of the workers were handling good that moved in interstate commerce. They were using tools at least that appeared to be, to have moved in interstate commerce. And they were using construction materials that could or probably had some of it moved in interstate commerce.

Q. What makes you say that those goods or tools had moved in interstate commerce?

A. Well, it would be the origin where the tools were being constructed. So if the tools were not made in the state of Utah and they were using them, we would determine that those goods moved in interstate commerce.

Q. If those goods or tools had been purchased in the state of Utah, does that affect your analysis?

A. It does not.

Q. What does affect your analysis?

A. Where the goods were manufactured. Or if the goods ended up out of state and were then shipped across state lines and ended up here and used by the workers, that would be what we would refer to as interstate commerce.

Q. To your knowledge, did Mychal Barber and Mychal Scott Barber handle tools that would have been moved interstate commerce?

A. Yes, they did.

Q. How did you make that determination?

A. I spoke to them about it. I did not see either of them at the worksite, but I spoke to them about it. And they also said that other workers were using tools that had moved in interstate commerce. And I confirmed that when I was at the job site.

Q. In addition to tools, did they provide you with information about materials that had moved in interstate commerce?

09:55:24

A. Yes, they did.

Q. And what was that information?

A. Well, that they themselves, that they used a lot of construction materials of various sorts, and that most of it or a lot of it probably had not been manufactured in the state of Utah. And they said also that they purchased or Mr. Mychal Barber said that he purchased items at a local stores, and that some of these items did not appear to have been manufactured in the state of Utah.

09:55:36

Q. And that information was particular to both Mychal Barber and Mychal Scott Barber?

09:55:57

A. Yes, it was; although I don't think Mychal Scott Barber was purchasing any of the goods themselves -- himself.

Q. Who was purchasing the materials that were used for Foreclosure job sites?

09:56:21

A. Well, Mychal Scott Barber said he did purchase some items, he told me.

Q. Who paid for the items that were purchased?

A. Foreclosure Connection.

Q. And the items that Mychal Barber purchase, who paid

09:56:32

for those items?

A. He did use his own tools he said on the job. So if he needed a tool, I guess, and those tools were his, if he bought one, those would be for him, I guess. But he did purchase goods, construction materials for Foreclosure Connection to be used at job sites.

Q. And who paid for the materials that were purchased?

A. Foreclosure Connection did.

Q. I'd like to turn your attention now to Exhibit 3, Tab 3 in your binder. What is this document?

A. This is an e-mail that I wrote and sent to Mr. Williams.

Q. Why did you write this e-mail?

A. It's a standard request for records, and it's sort of a follow-up request for records. Mr. Williams had said that employees were not -- you know, that workers were not employees, and so there were no payroll records that indicated payments to employees. We, however, had information and we'd been provided copies of pay stubs that had been given by Foreclosure Connection to Mychal Barber, Mychal Scott Barber, and I believe at this point two other employees who were working for Foreclosure Connection.

Q. The pay records that you mentioned, how did you receive those documents?

A. The Barbers, Mychal Scott Barber and Mychal Barber brought in pay stubs that they had been given along with their checks and -- I'm sorry. What was the question again?

Q. How did you receive those?

A. Yes. And also -- so they brought them in. We made photocopies of them. Also when we were on the job site, one of the workers told my colleague Investigator Funes that they could provide payroll records, pay stubs, I should say pay stubs they were given with their checks, and I believe at a later date Mr. Funes did obtain those from that worker.

Q. These pay stub records that you're referring, what is the content of those records?

A. The content is it's your basic pay stub. It shows the number of hours worked and the corresponding amount of pay that their checks reflect. And at this point, I can't remember if it actually showed taxes taken out, but I believe it did. It shows the amount of taxes taken out.

Q. And it's the similar type of document that you were referring to in your request for documents in this e-mail in Exhibit 3?

A. Yes, absolutely. This is exactly what I was trying to get at because Mr. Williams had said there were no such records and payroll records of this nature, records of payments to the workers of this nature. And so since I had those pay stubs that the employees had provided, I then proceeded to ask Mr. Williams for the specific pay stub which would be different than a general request for payroll records.

Q. What records were provided in response to this request?

A. I don't think they ever provided any of the pay stub information to us.

Q. So Foreclosure Connection did not provide pay stub records for the Barbers?

A. That's correct, they did not.

Q. And they did not provide pay stub records for any of the other individuals that are listed in Exhibit 3?

A. No, ma'am. I'm pretty sure they did not.

Q. Following this e-mail, what correspondence did you receive from Foreclosure in response?

A. I don't believe I received any correspondence -- well, no correspondence from Mr. Williams, I believe, following this. But I did receive at a later date a letter from his attorney David Ross.

Q. Turn your attention, please, to Exhibit 4.

Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's a letter that was sent to me and I received, and it was sent by David Ross.

Q. And what is the date of this letter?

A. The date is July 24th, 2015.

Q. What does this letter indicate about the relationship between Mr. Ross and Foreclosure Connection?

A. Mr. Ross states that he is, has been hired by and is representing Foreclosure Connection as an attorney.

10:01:53 Q. And what does this letter signify about the relationship between Mr. Ross and Mr. Williams?

A. That Mr. Ross is acting on behalf of Mr. Williams.

Q. Please summarize the information contained in this letter.

10:02:16 A. Yes. It first asks -- well, Mr. Ross identifies himself, and he explains the nature of his relationship and why it is that he is sending this. And it then goes on to address some of the requests for information and records from Foreclosure Connection. And Mr. Ross explains further that -- 10:02:45 or he says that the workers received 1099s each year and that they're not paid an hourly wage. But since they are treated as independent contractors, it's a business-to-business type of relationship. And he goes on to list, to state some 20-odd factors that he looked at. And he says, you know, he 10:03:16 mentions this to further his argument that these individuals are independent contractors and not employees.

Q. Can you turn your attention specifically to the third paragraph of this document and read for the Court that paragraph?

10:03:38 A. Third paragraph. It is my understanding that you requested specific information from my clients, and they provided everything that you requested except for pay stubs for certain named individuals. If this is incorrect, please advise me.

10:03:50 Q. Let me stop you there.

A. Yes.

Q. Was that understanding correct?

A. To the best of my knowledge, no.

Q. And what did you do in response?

10:04:04 A. Well, in response to this, I did communicate with Mr. Ross, and I believe at some point, you know, the fact that I thought he was misinformed or was trying to say, telling me that records had been provided when they hadn't. I believe we discussed that either verbally or via e-mail.

10:04:29 Q. Did you make additional requests for documents?

A. Yes, I did.

Q. Continuing after those two sentences that you read, could you read the remainder of the paragraph, please?

A. Yes. As for the request for pay stubs, there are 10:04:45 no pay stubs. My clients create printed time sheets for the workers. And then based upon the agreement with each worker, my clients remit payment to the worker based upon the hours worked and the rate per hour such worker has agreed to.

Q. What was your understanding of the information 10:05:02 conveyed in that paragraph?

A. I felt it to be untruthful.

Q. Why is that?

A. Because we had evidence that the workers were given pay stubs. I'd seen them, and I had them in my possession.

10:05:18

Q. Ultimately did Foreclosure Connection produce further records of pay stubs?

A. They did not.

Q. Turning then to the fourth paragraph of this exhibit, could you read the first two sentences of the fourth paragraph?

10:05:38

A. Yes. I have reviewed the agreement my clients have with each of the workers and note that each worker entered into any written agreement that states he is an independent contractor and not an employee. That each worker receives a 1099 for compensation paid pursuant to the agreements.

10:05:51

Q. What was your understanding of that portion of the letter?

A. Again, it seemed to be untruthful.

Q. Why is that?

10:06:04

A. Well, some employees had stated that they did not receive 1099s, and I don't really understand how it works, but they said they 1099ed themselves. And some years they may have gotten a 1099, but in other years they did not. And we also -- I also had information, no one had spoken of a written agreement as an independent contractor that they had with

10:06:31

Foreclosure Connection.

Q. Who specifically did you speak to with regard to independent contractor agreements?

A. Well, all the interviews that I conducted I addressed that issue as best I could. With Mychal Barber, Mychal Scott Barber. I interviewed also an individual who is identified as the foreman on the job site. I interviewed two other workers. His name is Jack Erickson, and then two other workers, I believe Mr. Villa and another worker who's name is escaping me at the moment. I interviewed him. And all of these -- whenever I conducted these formal interview statements, I made queries as to their employment relationship with Foreclosure Connection.

Q. Did Foreclosure Connection provide Wage Hour with independent contractor agreements in the course of your investigation?

A. They provided documents that they had said were independent contract agreements at a later date, yes.

Q. How many did they provide?

A. I want to say eight.

Q. Looking back at Exhibit 2 and the e-mail from Mr. Williams identifying independent contractors, how many independent contractors did Wage Hour -- I'm sorry -- did Foreclosure Connection identify as working for the company?

A. Yes. There's a list. It's certainly more than eight. I believe the number is closer to 26 or so. And that's just the individuals. We're not talking about the businesses that are also listed there.

Q. Turning back then to Exhibit 4 and the first sentence in Paragraph 4 of Exhibit 4, what is your understanding from that paragraph as to the number of independent contractor agreements that existed between Foreclosure Connection and its work force?

A. Could you repeat the question?

Q. Sure. Looking at that first sentence in Paragraph 4 and reading that sentence to include each of the workers, how many workers did Foreclosure Connection identify as having these independent contractor agreements?

A. Well, yes. Okay. So this sentence says basically that Mr. Ross says that he's reviewed the agreements that the employer has with each of the independent contractors. Each of the workers, he states, has one of these agreements. And each one in it states that they are an independent contractor and not an employee.

Q. Has Wage Hour received independent contractor agreements for each of the individuals listed in Exhibit 2?

A. No.

Q. Looking at the next sentence in that paragraph, how many workers does Mr. Ross identify as having received a 1099 from Foreclosure Connection?

A. He states that each one received a 1099.

Q. And did Wage Hour receive 1099s from Foreclosure Connection during the course of this investigation?

A. I don't think we did. If we did, we might have gotten one or two, but certainly not for each of the workers.

Q. Okay. You're not sure how many Wage Hour received?

A. Well, it would be in the records, yes. Off of the top of my head, I couldn't state the exact number.

Q. But you believe that it's not a number for each of the workers that are identified in Exhibit --

A. That's correct, yes. I do think we did get some. So, yes, I would say we did get some 1099s, along with the contractor agreements. But it was not one for each of the workers.

Q. Looking then at the factors that are identified in this letter in Exhibit 4, the 20 factors that you mentioned earlier, do you know the source of those factors?

A. Yes. And it's just sort of -- we haven't received any training on where this came from, but my understanding is that it's factors used by the IRS to determine an employer-employee relationship.

Q. Does Wage Hour have a test to determine an employer relationship?

A. Yes. We do have a test, yes.

Q. And is that test the same as the factors that are identified in this letter?

A. No, it is not.

Q. What are the factors that Wage Hour considers in determining an employment relationship?

10:11:36 A. Yes. We have six factors that we look at. I can list them as best I could. The first is whether or not the work being done is an integral part of the business. We also look at the opportunity. So that's one. We look at the opportunity for profit and loss by the worker. We look at the 10:11:54 amount of investments being made into the job and put into the work by both the employer and employee. We look at skilled initiative being used by the employee to the point how much initiative -- sorry. I should say worker -- the initiative the worker has. Has the worker demonstrated any initiative to 10:12:20 find the job or to conduct himself as an independent contractor? I would say we've got the permanency of the relationship. Is it an indefinite -- - you know, are you hired? You're a worker now. Is it an indefinite situation, or is it one that, you know, you do this job and then we'll 10:12:42 see about any further employment? That would be one way to characterize it.

And then the control that an employer has over the work being done and anyone doing the work as to maybe the hours that are worked. But not necessarily just the hours, 10:13:01 but also the control to sort of what you're going to do at

10:13:21

10:13:32

10:13:50

10:14:05

10:14:29

what time, who's going to, you know, work on what projects, things of that nature. Also, I mean, if the employer is allowed to hire any other workers to help him work, that would be part of that ethic.

Q. Is there some overlap between the factors that Wage Hour uses and the factors that are identified in the letter in Exhibit 4?

A. Yes, there are.

Q. Are they the same test?

A. It's not the same test, no.

Q. Following your receipt and review of this letter, did you stop your efforts to investigate the employer relationship of Foreclosure Connection to its work force?

A. No. The scrutiny over the employment relationship that existed between Foreclosure and the workers continued.

Q. And why is that?

A. Well, we wanted to take all the factors into account, and we still had not received a lot of the records that we had requested from Foreclosure Connection, and a lot of those records would have helped identify and indicate whether or not there was an employment relationship.

Q. Would you turn your attention, please, to Exhibit 5. What this is document?

A. This is an e-mail that I sent to Mr. Ross.

Q. And why did you send this e-mail?

A. This was sort of a -- this was another request, a further request for records from Foreclosure Connection. And so Mr. Ross, the initial request for information had been to, you know, the appointment had been given to Jason Williams. I wanted to make sure that Mr. Ross, that there was a record of me asking for all the necessary records directly from Mr. Ross.

Q. And up to this point where you made this request from Mr. Ross, had Foreclosure Connection provided you with all of the documents you requested?

A. No, they had not.

Q. When was this e-mail sent?

A. This e-mail was sent on Friday, August 7th of 2015.

Q. And types of records did this e-mail request with regard to pay and hours worked?

A. Yes. It requests a list of, let's see, a list of workers who work in the office and what their relationship is. And then again a list of employees, independent contractors and subcontractors who have worked or done business with Foreclosure Connection in the previous two years, payroll and/or time records recorded for all who worked for Foreclosure Connection from July 13 to the present. And payroll information 1099, W-2s, W-4s or W-9s issued by Foreclosure Connection to employees, independent contractors and subcontractors. All employment or work agreements that

10:16:26 Foreclosure Connection had with any employees or independent contractors and all contracts entered into between Foreclosure Connection and independent contractors and subcontractors.

Q. Looking specifically at Item 6, this item as you stated contains a list of -- requests a list of employees, independent contractors and subcontractors who worked for Foreclosure Connection?

A. Yes.

Q. What was the purpose of that request?

10:16:38 A. Well, the purpose again, it's to aid in the investigation. It's records that I need to conduct the investigation. And in this instance, we sort of highlighted the fact that we're asking again for these records from Foreclosure Connection. And then Mr. Ross who is representing

10:17:00 Foreclosure Connection, we're sort of highlighting the fact that we're asking them once again, and it doesn't specifically say this here, but it's not the first time that we've requested this.

Q. And looking at Item 7 in this e-mail in Exhibit 5,

10:17:15 it refers to payroll and/or timecards?

A. Yes, ma'am. Yes, it does.

Q. What is meant by payroll and/or timecards?

A. Payroll records would be a payroll run. It could be a payroll run that the company would use. It could be a

10:17:33 pay stub, copy of a pay stub. It could be an individual

10:17:53
10:18:11
10:18:37
10:18:57
10:19:19

record that is generated for each individual employee at our request or that shows how much an individual was paid in a given pay period.

Q. Looking at Item 8, there are four types of documents that are identified in that request. What are each of those four types of documents?

A. Well, 1099 as I said, I mean, we received some training on this, but not a lot. But 1099 would be like a form, an IRS form that an independent business or an independent contractor would file. A W-2, I know what a W-2 is. I receive it every year from my employer. It shows how much money I have earned and the taxes taken out. I'm not as familiar with a W-4 and W-9, but I know they're tax documents used by the IRS that an employer could file on behalf of a worker.

Q. And why does Wage Hour request such documents?

A. Well, at this point, my feeling for the W-4s and W-9s would be to show maybe if there is some sort of -- that they are treating some individuals as independent contractors. The 1099s, W-4s and W-9s, any record at this point that we're requesting that would show us if they might be treating as independent contractors.

Q. What response did you receive to this e-mail?

A. We did -- I did receive a number of documents sent by David Ross, records from Foreclosure Connection.

Q. Were those responses complete?
A. No, they were not.
Q. Why not?
A. I'm not sure -- well, they were not complete. They did not -- Mr. Ross had said in earlier communications that each employee was given a 1099, each employee had an agreement, a subcontractor agreement or independent contractor agreement. And while they did provide us some of the agreements, independent contractor agreements that they had or subcontractor agreements and some 1099s, it certainly was not complete. And I believe we said eight maybe or so at the most were provided for employees or workers, I should say.
Q. Turn your attention to Exhibit 6, please.
THE COURT: It's about time for our first break. Would this be a good place?
MS. PRZYBYLSKI: Yes, Your Honor.
THE COURT: All right. We'll be in recess for about 20 minutes about quarter to 11:00.
MS. PRZYBYLSKI: Thank you.
THE COURT: Thank you.
(Recess.)
THE COURT: You may proceed.
MS. PRZYBYLSKI: Thank you, Your Honor.
Q. BY MS. PRZYBYLSKI: Investigator Keith, before the break I called your attention to Exhibit 6. Do you have that

exhibit in front of you?

A. Yes, I do.

Q. What is this exhibit?

A. This is a letter sent from Mr. Ross to me.

10:43:47 Q. And when did you receive this letter?

A. It's dated August 26. I would think soon after, a couple days after.

Q. And what is this letter in response to?

A. It's in response to the e-mail that we had already

10:44:06 spoke of, the request of items that I made to Mr. Ross.

Q. And those were the items you requested in Exhibit 5?

A. Correct, yes.

Q. Turn your attention to the second page of this

10:44:27 document and the item listed as Item 2. What is the information provided in response to Item 2?

A. Yes. Mr. Ross is listing the entities that make a Foreclosure Connection or entities that are connected to Foreclosure Connection with the same business press.

10:44:59 Q. And why did Wage Hour request this type of information?

A. In terms of the enforcement, our enforcement policies, we need to establish if there are any other entities that might conduct the same type of work that the employer or

10:45:21 the owner might simply put under a different name to avoid certain things. And who knows what it might be to avoid or to benefit from. But in our -- what we look for is that if they have two separate entities and they're doing the same thing, same type of work, do they have employees that work at both entities or more than one of these entities, in which case we would establish, we would determine that it would be one enterprise and one establishment that the workers. Even though they worked for two separate entities that have different names they would be the same business purpose, same ownership, and, therefore, it would be working for the same employer in terms of what we would see and enforce the FLSA.

10:45:44
10:46:04

Q. You mentioned the word enterprise. Does that analysis pertain to coverage under the FLSA?

A. Yes. Yes, it does.

10:46:21 Q. How does it do that?

A. Also for enterprise, yes. If an employer puts up two businesses and each one of them make $250,000 a year and it's the same business purpose, we would add those two together to make $500,000. And then by that nature, there would be enterprise coverage.

10:46:45

Q. And that would pertain to the annual dollar volume requirement?

A. Yes. It would pertain to the annual dollar volume requirement of $500,000, the threshold being met or not met. And we would look to see if two employees were handling goods

10:46:57

moved in commerce.

Q. Could you turn to the fourth page of this exhibit, the one that begins with, Item Number 5.

A. Yes.

10:47:10 Q. Turning your attention to the item for Number 6. What information did Wage Hour request for this item?

A. Well, we requested a list of employees, independent contractors and subcontractors who had worked for Foreclosure Connection or any of the entities also owned by Foreclosure, 10:47:30 the same ownership. A list of all of them. All their names, and with any additional information that might be pertinent.

Q. So this request pertained not only to Foreclosure Connection, but the entities that are described in Item 2 of this exhibit?

10:47:52 A. Yes, that's correct.

Q. And what was the response received in regard to that request?

A. Yes. Well, it says here, we've already provided the list to Sheffield Keith. However, the list does not 10:48:03 include dates, it said. But it says they already provided us with this list.

Q. And do you know what list is being referenced in that response?

A. My take on this would be that they're referencing 10:48:15 that list of independent contractors that we've gone over that

I said were about 26 individuals listed.
Q. And is that the list of individuals in Exhibit 2?
A. I would think so, yes.
Q. What information was requested with regard to Item 7?
A. Well, we requested all payroll and/or timecards and records for all of the employees going back for two years.
Q. Turn your attention now to the next two pages in this document. The first page is a cover sheet, and the second page is a table. What is this information in response to?
A. Well, this is information in response to the request for payroll and time records for all the employees who had worked for Foreclosure Connection for the past two years. So the first page being attachment for Item Number 7 and the second page here being a table showing a list of what they're calling subcontractors and amounts paid to them between July 2013 and July 2015.
Q. The names that are listed in this page on Exhibit 6, I'd like you to take a moment to review them. And then I'd like to ask you to compare that list of names to the list of names in Exhibit 2.
A. Yes. Okay.
Q. And on your screen you can see both lists are simultaneously?

10:50:39
10:51:46
10:52:01
10:52:28
10:52:37

A. Yes. The lists are different. There are names, and each list do not appear in the other list.

MS. PRZYBYLSKI: May I have a moment, Your Honor?

THE COURT: Yes.

(Time lapse.)

MS. PRZYBYLSKI: Your Honor, may I approach the witness with the list of documents that have been identified and admitted as defendant's exhibits?

THE COURT: Yes.

Q. BY MS. PRZYBYLSKI: Investigator Keith, I've handed you what has been admitted into evidence as Defendant's Exhibits 11 through 18. Have you seen these documents before?

A. No, ma'am, I have not.

Q. Looking at the first page that is marked Exhibit A-11, there are two names that are identified on this exhibit. What are those names?

A. Mychal Barber and Gary Troy Denter.

Q. Looking at the list of names that appear in Exhibit 2 and Exhibit 6, does Gary Troy Denter's name appear on either list?

A. It appears on the first one here.

Q. That's the one on the left?

A. Yes, ma'am.

Q. That would be Exhibit 6?

A. Correct. And then Exhibit 2, I believe the name appears, but it's not the same name. It's similar Troy Denter.

Q. So Gary is missing from that name?

A. Yes, ma'am.

10:52:51 Q. Looking at the chart here for Gary Troy Denter, what is the information contained in the last column of that chart on A-11?

A. Number of hours worked on a given day.

Q. Is that a total number of hours?

10:53:15 A. Yes. Total, T-O-T, is what it says. So total number of hours, yes. I would assume that.

Q. And looking at the first column of that chart for Mr. Denter, what is the information contained in that column?

A. The first column would be the date.

10:53:31 Q. So am I correct in understanding that this document purports to show a date and total hours worked for Mr. Denter?

A. Yes, it does.

Q. I'd like to turn your attention now back to the fourth page of Exhibit 6, the one with Item 5 at the top.

10:54:03 A. Yes.

Q. Looking at the response that Foreclosure provided to Item 6, what is the response that's listed in this document?

A. Oh, basically that they say they've already

10:54:18 provided the information that I've requested.

Q. Okay. What information does this response provide with regard to dates of work performed by the list of independent contractors in Exhibit 2?

A. I'm not sure I understand. Could you repeat that?

10:54:40 Q. Sure. Can you read the first two sentences of the response in bullets that's on Item 6 in Exhibit 6, Page 4?

A. Yes. The bullet part. Okay. So we already provided this list to Sheffield Keith. However, the list did not perform dates when performed work. That would be an

10:55:01 impossible task.

Q. Looking at the Exhibit A-11 in defendant's exhibit list, are dates provided for both Mr. Barber and Mr. Denter?

A. Yes, they are.

10:55:13 Q. Do you have reason to challenge the claim in this Item 6 that Foreclosure Connection is unable to provide dates worked for its independent contractors?

A. Yes, I would challenge that. I would think it's untruthful.

10:55:39 Q. Why is that?

A. Well, because certain employees, workers Mychal Barber, Mychal Scott Barber and I believe one other worker did provide us pay stubs that indicated the amount of hours that they had worked and what their pay was. It basically said

10:56:04 their pay was defined by the number of hours that they worked.

And also in interview statements, I believe Mr. Erickson, maybe not in the statements but in speaking to other workers, they also stated they received pay stubs.

Q. Would those pay stubs also show the dates of work performed?

A. The pay stubs themselves would show pay period typically, but not necessarily it wouldn't go into detail as to how many hours were worked each day.

Q. I'd like to turn your attention to Exhibit 7, plaintiff's exhibit, and specifically to Page 3 of that exhibit.

A. Page 3-1.

Q. It's the one Bates stamped FC-38?

A. Yes.

Q. What is this document?

A. This is a document that was provided by Mr. Barber to me.

Q. And are these the pay stubs that you were referring to earlier?

A. Yes. This would be a pay stub, yes.

Q. What information is contained in each column of the top table in this document?

A. The dates worked.

Q. And in the second column?

A. The location where the work was performed.

Q. And in the third column?

A. I believe that would be indicating which entity the work was performed for. So maybe possibly if it was at a certain location, then that location would be owned by a certain entity. And this describes what that entity is.

10:58:01

Q. What's the information contained in the next two columns of that table?

A. Time in and time out.

Q. Is there a benefit to Foreclosure Connection if Wage Hour is unable to determine dates that workers performed work?

10:58:24

A. Yes, there is.

Q. And what is that benefit?

A. The benefit would be that they could possibly hide overtime hours worked, hours worked over 40 in a given work week.

10:58:35

Q. And why would that be the case?

A. Well, for example, if you have a two-week pay period and an individual worked, say, 80 hours and there is no record of how many hours they worked in a given day, then an employer could simply say they worked eight hours every day. And so the 80 hours, and there would be no overtime. Whereas, the reality is that they could have worked 45 hours one week and 35 the next, in which case there would be five hours of overtime that would have to be paid at premium, half-time

10:58:52

10:59:18

premium for those hours.

Q. Turning your attention back to the list of individuals on Page 5 of Plaintiff's Exhibit 6 -- I'm sorry. The list of item in response to Attachment 7.

10:59:51 A. Yes. Excuse me.

Q. Is Brandon Gilleland identified on this list?

A. I don't see his name on here, no.

Q. Who is Mr. Gilleland?

A. He was one of the workers that I interviewed at the job site -- at a job site. 11:00:20

Q. And do you know his relationship to Jason Williams?

A. When I spoke to him, he stated in the interview that he was a son-in-law.

Q. During the course of your investigation, how did Foreclosure identify Mr. Gilleland? 11:00:37

A. As a son-in-law and potentially part owner of some of the entities connected to Foreclosure Connection.

Q. Is David Garcia on this list in Exhibit 6?

A. He is not.

11:00:57 Q. Who is Mr. Garcia?

A. Mr. Garcia I understand is one of the workers, one of the workers who worked for Foreclosure Connection.

Q. And what's your understanding of what work he does?

A. Construction work. He does what he's told on a given day by the foreman. It can be anything from taking out 11:01:19

the trash to helping rebuild a house, painting or sheetrocking or something of that nature.

Q. Does Mr. Garcia work in the offices of Foreclosure Connection?

11:01:38 A. Yes. I'm sorry. Mr. Garcia is I was told involved in payroll. I'm confusing him with another individual. Sorry.

Q. So the answer you gave previously about his work, does perform that type of construction work?

11:01:50 A. No, he does not.

Q. What type of work does Mr. Garcia performed?

A. He performs clerical and payroll work as far as I understand. Clerical and payroll work at the Foreclosure Connection at the office.

11:02:03 Q. During your investigation, how did Foreclosure identify Mr. Garcia?

A. I'm not sure if they actually did identify him. He was identified to me by workers as the individual that they gave the records of their hours work to. They called in or 11:02:21 provided their records of their hours worked on a daily basis to him. We may -- Mr. Williams may have identified Mr. Garcia as one of the individuals who worked in the office, but he would have identified him as an owner and not a worker.

Q. Turning back two pages in Exhibit 6, in response to 11:02:51 Item 5, who are the owners that Foreclosure Connection identified as owners of that company?

A. I'm missing. Go up there. They're saying Alicia Williams, Jason Williams, Ashley Gilleland and Alex Williams.

Q. Is David Garcia on this list?

11:03:20 A. No, he's not.

Q. Is Brandon Gilleland on this list?

A. No, he's not.

Q. Turning back several pages to the list of subcontractors in Attachment 7 of Exhibit 6, is Jack Erickson on this list?

11:03:50

A. Yes, he is.

Q. Who is Jack Erickson?

A. He's an employee, a worker who I interviewed on a job site, a Foreclosure Connection job site.

11:04:06 Q. How did he identify his relationship to the company?

A. He said he was an employee.

Q. Anything else?

A. Yes. He said he was paid -- he was the foreman, and yet, he said he did not have any managerial duties other than dictating what work should be done. And by the managerial duties, I mean he didn't set anyone's pay rate or anything of that nature. But he was the onsite leader of the crew.

11:04:17

11:04:36 Q. How did Foreclosure Connection identify

Mr. Erickson during your investigation?

A. I don't recall specifically. But they would have said he would have been one of the independent contractors. They would have said -- and I do believe, actually, I do recall them identifying him as an independent contractor.

Q. And he's also identified on this list of independent contractors?

A. Yes.

Q. Is Mychal Scott Barber on this list in Exhibit 6?

A. Yes, he is.

Q. And is Mychal Barber also on this list in Exhibit 6?

A. Yes.

Q. I'm going to ask that we give each other time so we're not speaking over each other.

A. Yes.

Q. Is Exequiel Magana identified on this list?

A. Yes, he is.

Q. And for those three individuals, how did Foreclosure identify them during the course of your investigation?

A. As independent contractors.

Q. Did you have reason to disagree with that?

A. Yes, I do.

Q. What is that reason?

A. In the course of my investigation, through the tests that I looked at the duties test and other questions that I had both from these individuals and from speaking with Mr. Williams, I came to the conclusion that they were employees and not independent contractors.

Q. Did you make any sort of determination with regard to Mr. Erickson?

A. Yes, I did.

Q. What was that determination?

A. That he was not an independent contractor and that he was an employee.

Q. What were your reasons for making that determination?

A. That they were several. I spoke to Mr. Erickson at length, and I took a statement from him. I spoke to Mr. Erickson on several occasions, actually. I looked at the duties test and guidelines that I'm given to try and establish whether an employment relationship exists. I mentioned it before. I looked at, for instance, his potential for profit and loss and, you know, determined for instance in this case whether or not how quickly he worked or slowly or how good he may have probably worked with his work, whether that property sold for X amount or Y amount had no bearing on what Mr. Erickson was paid. Mr. Erickson was paid on an hourly basis. I spoke to Mr. Erickson about his status.

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Q. Investigator, you mentioned that Mr. Erickson was paid on an hourly basis. What was his hourly rate?

A. I believe it was $15 an hour.

Q. You're not sure?

A. I mean, off the top of my head, yeah. I believe it was -- it could have been 20 an hour. I apologize.

Q. Did you make a determination for Mr. Gilleland or Mr. Garcia as to whether or not they were employees of Foreclosure Connection?

A. I don't think I got there for Mr. Garcia and/or Mister -- you said Gilleland?

Q. Yes.

A. Yes. I don't think I reached that point.

Q. Why not?

A. I did not have access to some of the information that I requested -- well, I didn't get a lot of the information I requested from Foreclosure Connection with regards to their employment. And -- yes.

Q. Does being an owner of a company preclude, a partial owner of a company preclude an individual from being an employee of that company?

A. Not necessarily, no.

Q. Is it a factor that you consider, though?

A. Yes. Also the percentage of their ownership comes into question.

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Q. Were you presented with information in this case as to the percentage of ownership for Mr. Gilleland?
A. I was not.
Q. Were you presented in this case with information as to the percentage of ownership of Mr. Garcia?
A. I was not.
Q. Did you ask for such information?
A. Yes.
Q. I'd like you to turn your attention to the attachments that were provided in response to Item 8 in Exhibit 6. What are these documents?
A. These are documents that were provided to me by Mr. Ross.
Q. And specifically what types of documents are these?
A. These appear to be tax documents, I want to say 1099s, IRS documents that form of tax filing, 1099.
Q. And is that the same 1099 document that we were discussing earlier, the same type of document?
A. Yes.
Q. How many individuals did Foreclosure Connection provide 1099s for in this letter?
A. In terms of the percentages, it was not that many.
11, it looks like.
Q. And that's not all of the individuals that were identified earlier?

A. No, ma'am.
Q. Turning your attention, then, past the 1099 agreements to the documents that are attachments for Items 9 and 10 in Exhibit 6, what are these documents?
11:11:09 A. These are documents that were provided to me by David Ross.
Q. And what types of documents are they?
A. Well, there's supposedly subcontractor agreements, that's what they're titled.
11:11:25 Q. How many individuals are purported to have signed these subcontractors agreements in Exhibit 6?
A. Six.
Q. And what are the names of the individuals on these agreements?
11:12:01 A. Jack Erickson is one, Exequiel Magana is another one. Antonio Villa is another one. Adam Fausett is one. Mychal Barber is one. And Gary Troy Denter is one.
Q. Looking at the subcontractor agreement for Mychal Barber, have you reviewed the substance of this agreement?
11:12:43 A. Yes, I did.
Q. And is this agreement consistent in your experience with other types of agreements that Wage Hour has considered to be independent contractor agreements?
A. No, it is not.
11:12:55 Q. Why not?

11:13:15 A. There's not -- the information that's provided here is information that does not necessarily indicate a subcontractor agreement, an agreement between a subcontractor and employer in that it doesn't define a scope of work that is to be performed in the contract.

Q. Anything else?

11:13:43 A. There are no dates, there are no bid figures. And there could be other things. For instance, if someone wanted to hire new workers, that's not addressed. Just various things.

Q. Did you have an opportunity to discuss this document with Mr. Barber?

A. Yes, I did.

Q. And what was the substance of that discussion?

11:13:54 A. Well, I informed Mr. Barber that Foreclosure Connection had provided a, quote-unquote, subcontractor agreement that he allegedly had signed and entered into with Foreclosure Connection.

Q. And what was his response?

11:14:10 A. He said that he didn't know what I was talking about. He said he never signed any subcontractor agreement with Foreclosure Connection.

MR. ROSS: Your Honor, I'll object. That seems to be hearsay about that, whether Mr. Barber said that or not.

11:14:27 THE COURT: Your objection is what, hearsay objection?

MR. ROSS: Yes, sir.

THE COURT: It is hearsay, isn't it?

MS. PRZYBYLSKI: Your Honor, it is hearsay, but I'm not offering it for the truth of the matter asserted. I'm offering it for the effect that it had on Mr. Keith and his investigation.

THE COURT: It's admitted for that limited purpose.

Q. BY MS. PRZYBYLSKI: Looking at Exhibit Page 2 of this subcontractor agreement, do you recognize either of the signatures that are on this page?

A. Yes, I do.

Q. Which signatures do you recognize?

A. I recognize both. I recognize both.

Q. And how do you recognize the first signature under subcontractor?

A. The first signature is a signature that looks very much like a signature I saw Mychal Scott Barber sign when he signed the document interview statement that I provided for him to sign to verify it was him that he was making the statement.

Q. Mychal Scott Barber is the son?

A. Yes, ma'am.

Q. And who is your understanding that this agreement pertains to?

A. Mychal Barber.
Q. And he's the father?
A. Yes.
Q. You mentioned you had an opportunity to review Mychal Scott Barber's signature on the interview statements that you took from him. Did you have a similar opportunity with regard to Mychal Barber?
A. Yes, I did. I witnessed him sign the interview statement.
Q. Does the signature appear to be consistent with Mychal Barber's signature?
A. No, it is not.
Q. How are you familiar with the signature under the company column?
A. It's a signature that had appeared on the other subcontractor agreements, and I may have seen that elsewhere, also.
MR. ROSS: Your Honor, I'm going to object to foundation. I don't think he set himself out as an expert on comparing signatures.
MS. PRZYBYLSKI: Your Honor, more specifically, the Federal Rule of Evidence 901(b)(2) allows for nonexpert opinion about handwriting as long as the nonexpert's opinion is based on a familiarity that was not acquired for purposes of litigation. This was a standard part of Mr. Keith's

investigation.

THE COURT: It does. The objection is overruled.

Q. BY MS. PRZYBYLSKI: Investigator Keith, the signature for the subcontractor that's listed on this agreement in Exhibit 6, did that lead you to any conclusions about this document?

A. I'm sorry. I didn't follow the top of the question.

Q. Sure. The subcontractor agreement in Exhibit 6 and the signature that's contained on it, the information that you just testified to about that signature, did that lead you to any conclusions about this document?

A. Yes, it did.

Q. And what was the conclusion?

A. That it was fake.

Q. And why do you say that?

A. Because it's got Mychal Barber's name on it, but it doesn't have his signature. And as I stated earlier, it appeared the signature was that of his son.

Q. Did you have an opportunity to discuss with Mychal Scott Barber this document?

A. I can't remember if I did or not.

Q. Did you have an opportunity to discuss with Mychal Barber the appearance of his son's signature on this document?

A. Yes, I did.
Q. And what was the substance of that discussion?
A. He agreed with me that it looked like his son's signature. And he also stated that that was not his signature.
Q. Did that have any effect on your understanding of this document?
A. Yes, it did.
Q. And what was that effect?
A. Again, that this document was not what it -- not what it said it was or what Foreclosure Connection said it was.
Q. Investigator Keith, I want to move now to the employment relationship that you considered in this case. Can you described your efforts to determine the employment relationship between Foreclosure Connection and its work force in this case?
A. Yes. My efforts were standard for a case involving construction workers. And to explain that I mean in the construction industry there are sometimes independent contractors who are hired, and they can work alongside workers, employees of the company. So I set about to examine specifically and take specific time out to -- time in my investigation to determine whether or not there was an employee-employment relationship with the individuals who I

11:20:24 interviewed and the individuals that my colleague Investigator Hector Funes interviewed and then from that taking what we learned from them and applying that in a more general level to other employees of the firm who we did not get a chance to interview to individuals who may have worked there before in the last two years.

Q. Is that typical for Wage Hour to consider a number of interviews of individuals to represent the employment relationship for the total work force?

11:20:42 A. Yes, it is.

Q. And why is that?

A. Well, in many cases it's not chronologically feasible, it's not feasible to interview every single worker. And sometimes you can't actually even find all of the workers 11:21:02 who may have worked in a company in a firm, in the last two years. So it may simply be what we refer to as unlocatable. You don't have phone numbers for them and nobody else does and you can't get in touch with them, so you have to make a determination sometimes based on what you hear. So if you 11:21:18 interview, let's just say 10 workers and there's one worker you can't get if touch with but everything seems to be consistent with that worker is the type of work he did and things of that nature, maybe even the records that you obtained that showed payroll and time records, then we would 11:21:36 make a determination to say, let's just say in this case that

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individual was also an employee and not an independent contractor.

Q. You mentioned consistency. Why is consistency among the duties and conditions of workers important to that determination of an employment relationship?

A. Well, the consistency, the conditions obviously that the status can change for a worker or there may be something in the company that changed, as well. So we do look at consistency and then the overall picture of what was going on when we do make a determination like that when someone is not present and we're making a determination for them based on circumstantial evidence.

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Q. What efforts did you make to determine an employment relationship between Foreclosure Connection and its work force in this case?

11:22:29

A. Well, in this case, we interviewed -- we went to -- well, we spoke to Mychal Barber and Mychal Scott Barber who were workers and we went to a job site where work was being conducted, and we interviewed all of the employees or all of the workers at that job site. And all of the workers -- well, Investigator Funes asked a certain number of questions, but I, as well. I asked all the employees, the workers that I interviewed questions specifically to determine whether or not they were workers -- I mean, employees or independent contractors to determine whether there was an employment

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relationship between these workers and Foreclosure Connection.

Q. Other than these interviews, did you make any other efforts to determine any employment relationship in this case?

A. Well, yes. The efforts including requesting documents and records from Foreclosure Connection and even reviewing the documents that these workers had provided, based on that information and records of hours worked that they were given and they provided to me and to us.

Q. You testified earlier about the six factors that Wage Hour uses to determine an employment relationship. Can those factors you described generally as an economic reality test?

A. Yes. That's what we refer to it as. And, yes, it makes sense to call it that.

Q. What is the purpose of that test?

A. It is to determine -- I mean, certain in order to determine employment relationship, obviously there would have to be, we'd have to ask certain questions. And I guess as I'm speculating here, I guess. But as a department, in order for us to make a determination on whether or not a worker is an employee or independent contractor, we would have to have a set of guidelines that we would have to follow as investigators to make that determination. And I guess my managers have to make sure that I have followed those guidelines. And they, too, may have their own guidelines. I don't know about their training, though.

Q. Is an independent work contractor to your understanding someone who is in business for themselves?

A. That would be one of the factors. I would consider that, yes.

Q. And what about an employee, is an employee in business for himself?

A. No, he's not.

Q. And so the second economic reality test, does it speak to those factors?

A. Yes, it does.

Q. The first element of that test you mentioned earlier was the integral nature to the work of the business. What do you mean when you talk about the integral nature of the work?

A. So it's the work that is being done, integral part, the main part of what the business is about. The main part. One example would be, I mean, if it's a laundry operation. The workers are doing laundry, cleaning clothes, you could say this is integral to their work.

In this case, the construction work if individuals are performing construction in order to make the property better, to improve the property at which point the property Mr. Williams or Foreclosure Connection would make the determination whether or not to sell that property or turn it into a rental property. Flipping houses. They did flipping houses. I also understand they did turn some of them into rental property, and they may be waiting until the market got better. But mainly flipping houses is what they did. So the work that they're doing, the construction work they're doing, the ultimate purpose is to flip the property to make a profit on the property, then that would be integral to what Foreclosure Connection did as a business, and, therefore, the work that these workers were do would be integral to that business.

Q. So the business of Foreclosure Connection is flipping houses?

A. Yes. I'm sorry. I jumped ahead. Yes. That is how it was described to me by Mr. Williams.

Q. And what work were the workers that you interviewed doing for Foreclosure Connection?

A. Home improvement work. Construction work which was to improve the home that they were working on.

Q. And your earlier answer was to explain the connection between the connection of the business and the work the workers were doing?

A. Yes.

Q. Is it necessary under this factor that the work that's being considered is the only work being performed by the company?

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A. I'm not sure I understand.
Q. Let me rephrase. We were talking about the integral nature of the work to the business. The work that the workers performed for Foreclosure, if that's not the only work that Foreclosure Connection does, that change your determination?
A. No.
Q. Why not?
A. Well, like I say, it would not specifically. We look at the six factors and each individual factor does not necessarily -- I mean, if one factor is not met that does not necessarily cancel out the others. It's not a or -- it's not an or/and situation. It's more of an all six factors. We will use all six factors. The fact that it may not be the only work that the firm does, was that the question, the only work, then, that would simply be one of the items we would look at.
Q. If Foreclosure Connection were also in the business of property management, for example, and the workers that you interviewed didn't perform property management work, does that change your analysis of whether the work, the construction work they performed was integral to the business?
A. Yes. That's a good example. No, the answer is.
Q. Why not?
A. Well, like I say, the integral -- we look at the

work that the workers are doing. And we have to determine if that is integral to the work that the business that the firm is in. But the fact that -- but it's not exclusive to that. It doesn't necessarily mean, you know, that if the firm does 11:29:16 something else that every worker has to do every single job. It wouldn't -- that's not what it would be like.

Q. If a company like Foreclosure Connection chose to outsource all of its construction work to one other company, would that the fact that they could do that change your 11:29:40 analysis of whether the work these workers performed was integral to the business in this case?

A. Well, it be couldn't affect my ultimate conclusion, but the fact -- like I said earlier, the fact that the construction business sometimes independent contractors are 11:30:00 used was a factor in the way I at least approached my interview statements and my investigation as a whole.

Q. A second element of this test that you mentioned was the opportunity for profit or loss. What determination did you make with respect to whether there was such an 11:30:20 opportunity for the workers in this case?

A. Yes. I touched on this briefly earlier. But I did look at that, for instance, for Mr. Barber and Mr. Erickson. Like I said, I mean, the speed at which they worked, if they worked faster or slower or if they did let's 11:30:42 just say a really good job as opposed to, you know, a job just getting the work done, if they -- you know, the ultimate, the final, the end product was the house being done and if the house was sold for $200,000 or $100,000, what price that house was sold for and the profit that was made by Foreclosure 11:31:09 Connection did not affect the amount of money that Mr. Barber and Mr. Erickson were paid, compensated for the work that they did. So to that extent, I determined that, you know, there the possibility for them to control the profit and loss in the situation was not there.

11:31:29 Q. And you mentioned Mr. Barber and Mr. Erickson in your response. Which Barber are you referring to?

A. I'm sorry. Well, both of them. Mychal Scott and Mychal Barber.

Q. And would that same analysis apply as Exequiel 11:31:51 Magana?

A. Yes. In that instance, I spoke to Mychal Scott Barber, Mychal Barber, Jack Erickson and Mr. Denter, and my colleague interviewed other employees. But, yes, I mean, we would -- I took a look at the responses that I got, and then I 11:32:08 cross-referenced responses that my colleague got. And the determination was made that, yes, none of those workers were, with the exception of Mr. Denter which was slightly different, they were not employees.

Q. You said they were not employees?

11:32:25 A. I'm sorry. I got -- and I'm getting confused.

Mr. Denter had a special relationship which was a little bit different than the other employees because he was a son-in-law and he worked independently. That they were employees. I'm sorry.

Q. And the individuals that you mentioned, the Barbers, Mr. Erickson and Mr. Magana, what work was it that they were doing for Foreclosure?

A. The construction work and home improvement work.

Q. A third element of the test that you mentioned is the permanency of the relationship. Can you explain how you considered that factor in this case?

A. Yes. The permanency would be addressed by, for instance, do they work specifically for one individual Foreclosure Connection? And when they were hired or when they were hired on to do this job, was there an end in site? Were they told that this job would last for X-number of days? Would it entail a certain part of work, or would it entail, you know, just open-ended? Would it be working until I say, you no longer work? And without regards to the specific job and in this case, let's just say a certain property, when that property was, when they finished rebuilding and refurbishing that property, would the work continue, would their employment relationship continue? And the answer was, yes, they would.

Q. I'd like to turn back your attention now to the subcontractor agreement listed in Exhibit 6. Am I correct that you mentioned earlier that there were subcontractor agreements for Mr. Erickson, Mr. Magana, Mr. Barber and Mr. Denter?

A. Yes.

11:34:24 Q. In reviewing those -- let me ask you, did you have an opportunity to review all of those documents?

A. Yes, I did.

Q. In reviewing those documents, is the content of this subcontractor agreement substantially similar for each of those agreements?

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A. Yes, it is.

Q. What does -- looking at the agreement for Mr. Erickson by way of example, what does this subcontractor agreement say with regard to the length of the relationship between Mr. Erickson and Foreclosure Connection?

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A. It was open-ended.

Q. And is there a particular section of this document you can point to to support that?

A. Yes. I mean, for instance, the first bullet point, jobs varying in location and the subcontractor agrees to bid each job. So it's just not one job. Yes, it's saying that the subcontractor agrees to bid each job, but it says that there's sort of an open-ended period here, that he's going to be employed or he's going to be empowered to work at various sites, and it's not just one location.

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Q. You mentioned that first bullet point speaks to the subcontractor bidding each job. Did you make a determination in this case as to whether Mr. Erickson or the other workers for whom there are subcontractor agreements in Exhibit 6 bid jobs for Foreclosure?

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A. I asked -- I asked them, and they said they did not bid on any jobs.

Q. Did you have an opportunity to discuss that with Mr. Williams?

11:36:09

A. Well, in the initial conference, yes, he had stated that they were, everyone was an independent contractor, and he described how the process was. And he further said that -- later he did describe that, and he said that all the pay that these individuals received were -- was actually a draw. And it wasn't really paid for hours work. It was a draw based on the bid that they submitted for the job.

11:36:40

Q. Did you receive any documents suggesting that there was a bid or draws had been made on the bid for any of those individuals identified in these subcontractor agreements?

11:36:57

A. I did not receive one document that had any evidence of any bids being made on any job at any location.

Q. By any worker?

A. Correct. Yes. No, not by any worker.

Q. And when Mr. Williams said to you that these were draws, what did you understand that term to mean?

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A. Well, a draw would be parlance for work that could be done. In this case, the draw would be given to a subcontractor or independent contractor. Let's just say, for example, an independent contractor says, I'll do this job for $1,000, and then the employer says, okay. I'll pay you the $1,000 when the job is complete. Let's just say the job takes two weeks. But after a week, the independent contractor says, hey, can you give me any money, you know, for this weekend? I want to do X, Y and Z, and I've done all this work for you. The employer could agree to give the worker, the independent contractor a draw against $1,000, let's just say the amount of the bid of the contract. And then at the end of the, when the job is completed, the employer would pay the remaining amount of whatever the contract was for.

Q. So in your example, if the agreement between the employer and the contractor was for a draw of $10 an hour on all hours worked and during that week the independent contractor had worked 10 hours, it would be a draw for $100, and then he would receive the balance of $1,000 at the end of the work?

A. Well, yeah. I mean, that was the explanation that was presented. Yes.

Q. In your investigation, did you determine whether there was evidence of such a relationship between Foreclosure Connection and its work force?

A. Well, no. The evidence pointed to the fact that these individuals were paid for an hour based on they were paid hourly, that they were - for whatever amount of work they did, they were paid a certain rate of, let's just say, $10 an hour, $15, $25 an hour. And what they were paid was not a draw. It was simply for hours worked. And this obviously would go back to say that this wasn't a draw. I mean, my conclusion was that this was not a draw, that this was hourly rates that these workers were being paid.

Q. Going back to the factors of the economic reality test that we were discussing, a fourth factor would be the skill or initiative required by the employee; is that right?

A. Yes.

Q. And what determination did you make as to that factor in this case?

A. Well, skill and initiative, let's just say for Mr. Erickson, the foreman, and/or Mr. Barber who seemed to be the more skilled of the work force, there was no initiative on their part to bid for jobs. There was no initiative. Since they didn't bid on jobs, they weren't showing an initiative to be in business for themselves, to be working for themselves, to profit and loss from each job. So the initiative to be -- that would have to be there to be present for an independent contractor was not there.

Q. You mentioned that Mr. Barber and Mr. Erickson were the more skilled workers. What led you to that conclusion?

A. Well, the interviews in talking to them. Like I say, I did not witness Mr. Barber working, but I did not witness Mr. Erickson working. And he was clearly in charge of the job site.

Q. Do you know whether Mr. Barber is a licensed contractor?

A. Yes. He admitted as much to me, that he was, that he did have an independent contractor license.

Q. An independent contractors license?

A. I'm sorry. General contractor.

Q. Who provides that license?

A. I believe it's the state of Utah, or it might be the county. I'm not exactly clear.

Q. Does Mr. Erickson have such a license?

A. I believe at one point he did have a license. I can't remember if he said it was current or not. I believe at one point he said he did. But I can't be 100-percent sure on that.

Q. Does the fact that a worker have a contractor's license issued by the state change your analysis with regard to the skill or initiative factor?

A. It would be something that I would look at, yes. It would have a determination on that factor. Whether or not they did have a license, yes, it would.

Q. Does the fact of having a license standing by itself determine whether or not a worker is an independent contractor?

A. No, absolutely not.

11:42:29 Q. Why not?

A. Well, in this -- I mean, let's just say if someone does have a contractor's license they may not be using it in this case. I mean, using it -- my understanding having -- you have to be insured. You have to have a number of things. So 11:42:48 if you go on, it doesn't mean that every job you take you're going to be taking it as and using your license. I mean, if that's the case, I believe, the work that's done would then be your responsibility, as well. So there's certainly a number of factors that need to be taken into consideration beyond 11:43:07 just the fact that someone, a worker may or may not have held a contractor's license at one point in time.

Q. If Mr. Barber in this case had a license and the insurance documentation that you were mentioning, does that change your analysis with regard to this factor and whether or 11:43:27 not he was an employee?

A. It would have weighed it, weighed on my determination and was one factor, but it did not ultimately speak to or say the determine he was an independent contractor in doing these tests that we looked at.

11:43:43 Q. Why not?

A. Well, like I say, in this instance, Mr. Barber said in his statement that Foreclosure Connection had never taken down any information about the contract, the contractor's license. So the number, for instance, the license Foreclosure Connection did not have a record of that. And that's what Mr. Barber told me and this evidence. No evidence contradicting this was provided by Foreclosure Connection. So the fact that Mr. Barber did have a contractor's license at one point, I determined that it did not significantly change even that one factor that I was looking the skill and initiative factor because it was not being used in this case. He was simply doing work at the direction of others including possibly Mr. Erickson and/or Mr. Williams. And so the fact that he had a contractor's license did not weigh, had no effect on his work there.

Q. You spoke to this skill and initiative factor with regard to Mr. Barber and Mr. Erickson. How did you consider that same factor with regard to Mychal Scott Barber and Mr. Magana?

A. Well, Mr. Magana described his duties and so did Mychal Scott Barber. They both described their duties and what they did. And they explained sort of who they got direction from. Mychal Scott Barber, for instance, took direction from his father Mychal Barber on what to do and how to do certain jobs. Mr. Magana by his own description did not have a lot of construction skills, skills of a construction worker, and he sort of did the jobs such as, you know, maybe cleaning up the work site and things of that nature.

Q. You mentioned that Mychal Scott Barber took direction from his father. How did that factor into your analysis of the skill and initiative element?

A. Yes. The skill and initiative element there would have been that the determination being if he's taking direction from his father on how to do jobs and how to -- what to work on that he was not in business for himself, that he was not an independent contractor, that he was not showing initiative to be an independent contractor, to be in business for himself and his skill level since he was being told what to do. I mean, his skill level was not that it would indicate the possibility that he could even, you know, sell himself as an independent contractor as a construction worker.

Q. How did the fact that Mr. Barber provided direction on the job for his son affect your analysis as to whether or not he was an employee or an independent contractor of Foreclosure Connection?

A. I certainly looked at it. And I did ask -- I asked myself and I looked at the evidence to see whether or not Mychal Scott Barber was an employee of Mychal Barber or whether Mychal Scott Barber was an employee of Foreclosure Connection. And so with that in mind, if Mychal Scott Barber was an employee of Mychal Barber, then, you know, that might point to an independent contractor situation. But the evidence was that Mychal Barber did not pay Mychal Scott Barber. Foreclosure Connection paid Mychal Scott Barber directly, and Mychal Barber did not have a say in let's just say how much money Mychal Scott Barber was paid. It was up to Foreclosure Connection to make that determination.

Q. Who made the assignments for work for Mychal Barber?

A. My understanding was that it was a combination of Jack Erickson and Jason Williams. When Mychal Barber was working a job site with Jack Erickson, Jack Erickson was still in charge as the crew leader. But the indications I got from Jack Erickson was that Mychal Barber was as skilled in the construction trades as he was, and, therefore, he was given certain leniency in terms of, you know, direction on work and instructions on how to perform work. But Mr. Erickson was in charge -- you know, when Mr. Mychal Barber was at a job site, Jack Erickson was still the nominal leader. If Mr. Barber did not work on a site where Mr. Erickson was, if he was off on his own, my understanding was that the direction he got on what jobs to perform and the time frames to complete those jobs were provided by Mr. Williams.

Q. And what direction was given, who gave direction to Mychal Scott Barber on what assignments he was to work?

A. Mychal Scott Barber always worked with his father, and he received direction generally from his father. I'm not sure if I asked the question of whether Mr. Barber was at a location -- if Mychal Barber was at a location where Jack Erickson was, if there was an instance where Mr. Erickson directly gave Mychal Scott Barber an order or told him to work on something. But in general for the most part, Mychal Scott Barber took direction from his father Mychal Barber.

Q. Based on your review, then, would it be fair to say that Mychal Scott Barber's work was derivative of his father's work?

A. Derivative, I'd have a tough time --

Q. Let me ask you a question a different way. If Mychal Barber received an assignment from Foreclosure Connection and Mychal Scott Barber took direction from his father, would it be fair to say that the assignment Mychal Scott Barber was working on would be the same assignment that Mychal Barber was working on?

A. Yes.

Q. And to your knowledge, how often was that the case?

A. All the time.

Q. In discussing the economic reality test, the fifth factor that you identify is the relative investments of the employer and the worker; is that right?

A. Yes.

Q. What determinations did you make as to the relative investments in this case?

A. Well, the determination was made, the questions were supposed to each of the worker that we interviewed, for instance, who owned the materials that were used at the job site and the materials that were used to perform the home renovations and remodeling. And the answer was that most of the tools, the individual tools were owned by the individual workers.

So let's just say a screwdriver or a hammer would be owned by the worker, but that there were some tools that were also owned by Mr. Williams and by Foreclosure Connection. And the larger tools, maybe like a handsaw -- sorry, a table saw, maybe a handsaw, but a table saw, some of the larger tools and equipment, and those were transported from job site to job site in a trailer that was provided by, it was owned by Foreclosure Connection.

Q. Is it typical in your experience in the construction industry for construction workers to provide their own hand tools?

A. Yes. And that is pretty much always the case. The small hand tools will be owned by the individual workers. And it's also common that any larger tools, specifically like cutting tools or something of that nature will be owned by can be owned by the firm.

Q. In that consideration, then, how does that affect your analysis of the relative investments of the workers and Foreclosure Connection in this case?

A. Yes. Okay. That was one of the factors that I looked at. So the tools were owned by both. But I also looked at the other investments. I mean, who owned the properties that were being worked on? The owners of the -- the owner of the property was Foreclosure Connection and maybe one of the other entities. Also the construction materials that were used were all purchased and owned for that matter by Foreclosure Connection. None of the workers bought any of the construction materials that were used in these home renovations and the remodeling jobs. All of that material was purchased by Foreclosure Connection. And in some instances by the employees like Mr. Barber would go to Home Depot to buy material. He would not pay for it.

Q. Would the fact that a worker provided his own tools on a job site change your analysis as to whether or not he was an independent contractor?

A. It would be one of the factors I would look at. But specifically just the fact that all -- let's just say if all the tools on a job site were provided by a worker, that would be only one of the elements that I would look for even in this one of the duties test, one of the six investment part of the duties test. It would be one of the factors that I would look at. And specifically mean that alone would not be enough to make a determination.

Q. In speaking to the relative investments, you mentioned the purchase of properties and the purchase of materials. How did that affect your analysis of this element?

A. Well, those two items were taken into consideration with everything else. In terms of the investments, all of the investments, I mean, if I looked at it I tried to look at what investments were made. And those seem to be the three -- excuse me. Those seem to be the three big groups who owned the property, who bought the materials, and who provided the tools for the remodeling job. That's how I broke it down.

Q. And in this case, who did provide the tools?

A. Well, okay. So the tools the workers provided some, and the employer provided some.

Q. And who purchased the properties?

A. The employer.

Q. And who purchased the materials?

A. The employer.

Q. What was your ultimate conclusion with regard to the relative development of the parties in this case?

A. My -- on that one test, I cited I determined that most of the investments were by the employer, and very little of the investments were by the employees, the workers. Furthermore, I mean, tools that the workers used and own, they used those on many jobs, and they could take them with them if they quit the job or they were theirs. And like I said, they used them on many jobs. It wasn't just one job, whereas the investments that the employer was making were job specific investments. So if they needed sheetrock to put up new sheetrock, they would buy the sheetrock for that specific house. There might have been some left over, but the majority of it was bought specifically for that one house. And the property itself was theirs. And no one else had any involvement in that.

Q. The last element that you mentioned with regard to the economic realities test is control. What determinations did you make about control in this case?

A. The control in this case was exerted by the employer, Jason Williams. He was ultimately responsible for the work that was being done, people, the workers. He on a daily basis would inform Mr. Erickson who to have on the job site, where what job site they should work on, what type of work they should do, what timeframe, how much time should be spent doing each job. That was where the ultimate control came from and was exerted. The employees, I looked at what control the employees had. And there was a general feeling or just an agreement, I guess, as sort of a general agreement that the workers would show up at a certain time, from 8:00 a.m. to 5:00 p.m., let's just say. And some of the

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answers we got from the employees varied a little bit on start time and end time of the day. But they were expected to be there from generally for the day. If they did show up a little bit late, it was not that big of a deal. Or maybe if they left a little early, probably wasn't that big of a deal, either. But they were expected to work a general day, a shift that was stipulated by the employer through in many instances Jack Erickson, the foreman. He would tell people sort of when to show up and at what time. And that was dictated by Jason Williams to Mr. Erickson. And so who worked on the jobs, that was controlled by Mr. Williams. Mr. Erickson was given specific information on who he should have working at his job site. And then Mr. Williams would also, let's just say in the instance where Mr. Barber was not working with Mr. Erickson, Mr. Mychal Barber, I should say, clarify, Mychal Barber would get those instructions directly from Mr. Williams. That's my understanding.

Q. Would flexibility in hours standing alone indicate that a worker was an independent contractor?

A. No, it would not. It would simply be one of the factors that I look at.

Q. And why is that?

A. Well, in the construction industry, let's just say there's no rigid -- the work hours aren't quite as rigid as they may be for other jobs. So with that being the case, one has to look at, you know, how important is it in some jobs, you, know the timeframe is more rigid than others? So that's why it would only -- it would only affect a certain part of it. Let's just say, I mean, even sometimes, I mean, people get rides from people. Sometimes they show up at a shop, and they're supposed to go to the shop first and then they go to the job site. Because of the different types of sort of schedules that people can have, the schedule can only have so much weight and importance.

And in this case, you know, we got varying -- we did get some different statements as to when people were expected on the job sites. So that did suggest, okay, the work shift was not a rigid 8:00 to 5:00. People were not clocking in and clocking out. There was no portable time machine at the job sites that the employers set out there.

So, however, the workers were expected to show up and work upon a daily basis. I mean, Mr. Erickson would give instructions on who would show up at a site. He would tell them, okay, tomorrow we're working on this site. And the job, you know, start time, be there at 8:00 a.m., and he would be the one who would say, okay. We're done for the day.

So like I say, the flexibility in the work schedule can't be the sole determining factor in the control because of this nature that I'm describing.

Q. The control that you described for Mr. Williams, was that control applied to each of the workers that are identified in these subcontractor agreements in Exhibit 6?

A. Well, I mean, I wouldn't be able to speak to each one of these individuals. But the workers that we did speak to, yes.

Q. So that would include Mr. Barber?

A. Yes.

Q. And his son?

A. Yes.

Q. And it would include Mr. Magana?

A. Yes.

Q. And it would include Mr. Erickson?

A. Yes.

Q. Did you make a determination of who the employer was in this case?

A. Yes, I did.

Q. And who was that determination?

A. The determination was that Jason Williams was the person who I would identify as the employer, and he was the sole employer.

Q. And how did you make that determination?

A. In discussions with Mr. Williams and in discussions with Mr. Erickson who received some direction and guidance and was told what to do by Mr. Williams and Mr. Barber, Mychal Barber, who also received directions from Mr. Williams.

Q. Who set the pay rates at that Foreclosure Connection?

A. Mr. Williams did.

Q. And who was ultimately responsible for determining which workers were brought on to which projects?

A. Mr. Williams was.

Q. Are those things you would consider in determining whether or not Mr. Williams was an employer?

A. Those are two of the factors, yes.

Q. Are there other factors that you considered?

A. Yes, there are. Who controls the day-to-day operations of the business. I mean, in this case there were things going on in that business aside from this construction work. I mean, even in the office, you know, Mr. Williams was in charge and he ran the business. He made the decisions as to what properties to buy. He would make the decision on what properties to sell, when to sell, which properties would be renovated at what time. The timeframe for the renovations. He would decide on whether or not a property would be put back on the market or used as a rental property until maybe things changed, maybe he changed his mind, maybe the market got better or something. Those are the decisions that Mr. Williams was making.

Q. Do you know if other business partners of Mr. Williams assisted in those decisions?

A. I do not know. I don't know that.
Q. If his other business partners had assisted in those decisions, would that change your analysis as to whether or not Mr. Williams was an employer for purposes of the FLSA?
12:03:34 A. Well, it would be something I would look at along with the other factors. I mean, the direction of the business is certainly one thing that I would look at. But the other factors also come into play, such as who is setting the pay rates of the employees and who is directing the employees, as
12:03:52 well.
Q. Would your ultimate conclusion change in this case?
A. It probably would not, no. I would say no.
Q. We talked earlier about your familiarity with Section 15(a)(3) of the FLSA. What is that section?
12:04:15 A. It deals with retaliation against workers for exercising their rights under the FLSA.
Q. Okay. And what rights does that provision protect?
A. Well, the rights to, let's just say overtime, minimum wage, child label and recordkeeping.
12:04:36 Q. And who does that provision apply to?
A. To the employer. But it includes, it applies to the employees, as well.
Q. Do you have to be an employee of a company under the FLSA for that provision to apply?
12:04:56 A. Yes.

Q. Does only a employer have the ability to retaliate against employees under that provision?
A. Yes.
Q. Let me ask the question a different way. Is that provision limited only to employers for purposes of protection? Are only employers defined under the act people who can be held accountable for action to retaliate against employees?
A. Yes.
12:05:22 Q. Why would that be the case?
A. Well, the protection that it guarantees is it guarantees against retaliation for an employee, and the retaliation being the act being committed by the employer. So the employee is the one who is being protected here from retaliation and retaliatory act by the employer. And at this point, it assumes that the retaliation is for violation of an employee's rights under the Fair Labor Standards Act.
Q. Could an agent of an employer, a foreman or supervisor also retaliate against an employee's under Section 15(a)(3)?
A. Yes. Yes. Absolutely there could be retaliation, yes.
Q. And how would that be the case?
A. Well, let's just say if a foreman fires a worker for speaking to an investigator on a job site, that would be,

you know, the foreman is retaliating. But in this case, the foreman is acting on behalf of the employer.

Q. So is there a distinction to be made between an employer in an individual context and an employer that is required for a relationship, a company that's required to establish a violation under Section 15(a)(3)?

A. Yes.

Q. And what is that distinction?

A. Well, the distinction is, let's just say, for example, I mean -- can you rephrase it?

Q. Sure. So we've been talking about an employer, and we've been using it in two terms, both for an individual and for a company.

A. Right.

Q. Am I correct in understanding your answer that there has to be an employment relationship with a company for there to be -- there has to be that employment relationship to be a violation of 15(a)(3)?

A. Yes. 15(a)(3) is for the workers. If you weren't an independent contractor, it would be business to business and Fair Labor Standards Act would not apply.

Q. But there's not the same sort of limitation that an individual who is identified as an employer is the only person who could retaliate under Section 15(a)(3)?

A. Correct. That's my understanding.

Q. Are there people who represent the company could take retaliatory action under that section?

A. Yes. For instance, anyone who is getting direction from the employer, for instance, a boss, you get an owner and he tells the boss to fire somebody, and so it's basically yes.

Q. Okay. In this case, were the Barbers ultimately stopped from continuing work with Foreclosure Connection?

A. Yes, they were.

Q. And when did that happen?

A. Well, stopped for good came after my investigation began.

Q. Okay. And how was that information -- what is your understanding of how that information was communicated to the Barbers?

A. Jack Erickson communicated that to the Barbers.

Q. In that circumstance where Jack Erickson communicated that information, do you know who instructed Mr. Erickson to do so or if he did so of his own initiative?

A. No. Mr. Erickson said that Mr. Williams had told him to do what he did. So in this case, he said that Mr. Williams said, told him not to hire Mychal Barber and Mychal Scott Barber any more because he felt that they were the ones who turned him into the Department of Labor.

Q. So in this circumstance where you understand that Jason Williams directed Jack Erickson to sever the relationship with the Barbers, how does that fit under the scope of retaliation in Section 15(a)(3)?

A. Well, the fact that it's covered under 15(a)(3), the fact that Mr. Erickson is relaying information direction that is he is given by the employer, it's still covered, it's covered under the 15(a)(3). The motive and the direction is coming from the employer.

Q. How did you learn that the Barbers had stopped working for Foreclosure?

12:10:20 A. They told me, and Mr. Erickson also confirmed it.

Q. Any other ways?

A. I'm not sure if I specifically spoke to Mr. Williams about this. But, no. I believe it was information I got from -- I mean, they weren't providing a lot of records, anyway, so I couldn't look at records. It was -- if I recall correctly, it was -- I learned of this from the Barbers, Mychal Scott and Mychal Barber, and also from Mr. Erickson.

Q. What did Mr. Erickson tell you about the circumstances of this termination?

A. Yes. We spoke at length about the Barbers and the termination, and he said -- and this was gone over at length because of the timing of this. And so on July 8th, I began my investigation. On July 7th, they came into our office and filed a complain. And because of the child labor issues, we -- I set in motion and cleared it with my manager to set in motion to begin the investigation as soon as possible. And in this case, as soon as possible was going to be the next day, the next morning. So that was on July 7th.

12:11:55 So on the morning of July 8th, I showed up at the establishment Foreclosure Connection around I want to say 10:00 a.m., maybe 10:30 a.m., it could have been 11:00, but I still feel it was 10:00 or 10:30 a.m., and I began the investigation. Later I was told when I was informed by the 12:12:22 Barbers that they were informed not to return to work, I specifically asked them the timing of what this was and I spoke to Mr. Erickson about the timing of this.

So Mr. Erickson stated that on the morning of July 8th, which was before I showed up at the establishment, 12:12:41 so I make this point because at this point Mr. Williams had not been informed that there was a Department of Labor investigation. So in that sense, you know, he couldn't have terminated them before this. But on the morning of even before I had shown up, on the morning of July 8th, the Barbers 12:13:04 were told not to show up to work, but the reason given to them was that it was because there wasn't enough work. There had been some work stoppages, I believe, already mentioned here in this court. The work had slowed down because of some red tape or something, so there wasn't any work for them to do that 12:13:24 day. So they were told not to show up on that day. And that was either in the morning or the previous afternoon when this conversation took place. And that would have been July 7th, the afternoon of July 7th. It wasn't until after my investigation began. And I'm told that the conversation that Mr. Williams had with Mr. Erickson was after the investigation I had. I'm talking about the conversation where Mr. Williams told Mr. Erickson not to hire the Barbers again. So never hire Mychal Barber and never hire Mychal Scott Barber again. That conversation came from Mr. Williams to Mr. Erickson per Mr. Erickson who is saying this, on the afternoon of July 8th.

At that point, I believe that afternoon Mr. Barber, Mychal Barber called Mr. Erickson where he should show up to work the following day or if he should show up for work the following day. At that point Mr. Barber and Mr. Erickson, their versions of this. At that point in the afternoon on July 8th, Mr. Erickson told Mr. Barber that, Mychal Barber, that he and Scott Mychal Scott Barber were no longer going to work for Foreclosure Connection. And because they had an arrangement they were sort of friendly, I believe that Mr. Erickson even informed Mr. Barber that it was because he thought, Jason Williams thought that the Barbers had turned him into the Department of Labor for the child labor issues and the overtime issues.

Q. Were you able to determine whether there was a connection based on the information that you received from the

Barbers and Mr. Erickson that there was a connection between their termination and Wage Hour's investigation?

A. Yes. And I base this on statements, interview statements from Mr. Erickson and the Barbers. And yes. Mr. Erickson and Mr. Barber -- well, Mr. Barber's information -- well, no. That's not true. So Mr. Erickson said he had been told by Mr. Williams not to hire Mychal Barber and Mychal Scott Barber at any point going further on July 8th, the afternoon of July 8th. The reason given for that was that he felt, Mr. Williams felt that Mr. Barber, Mychal Barber, and Mychal Scott Barber had been the ones who had been the cause of this Department of Labor investigation.

Q. In addition to those interviews, did you obtain any other evidence in this case that supported your determination?

A. Yes. There was a conversation that Mr. Williams had with his workers at a job site, and that was recorded. And that recording, there is sort of -- this is spoken about and addressed in at that meeting. And it is then recorded, yes.

Q. How did you learn of this recording?

A. One of the workers informed Investigator Funes that the meeting was taking place. Investigator Funes was in contact with this worker Mr. Magana, Exequiel Magana, to get pay stub information that the worker said he had. And in the course of obtaining these pay stubs, the worker texted

Mr. Funes, Investigator Funes saying, oh, you know, the owner is here. Jason Williams is here, and he's talking to us. And later he said, I have a recording of this conversation.

Q. Was that recording ultimately provided to Wage Hour?

A. Yes.

Q. And did you have an opportunity to review it?

A. Yes, I did.

Q. Was there any other information from that recording that influenced your determination as to documents provided in this case?

A. Yes.

Q. What was that?

A. The subcontractor agreements.

Q. And what information was provided in the recording with respect to subcontract agreements?

A. In the recording, Mr. Williams is overheard talking about his plan, that he had been advised to do this, and he's got this plan to provide the workers with subcontractor agreements that they are supposed to sign. And these agreements will state that each worker has agreed to be, to work for Foreclosure Connection as a subcontractor. And that these subcontractor agreements are not going to be dated. And further directions that the employees were provided was that if they're asked by the Department of Labor or a Department of

Labor investigator that they should simply say that they do not remember when they signed these agreements.

Q. When was this meeting when those statements were made?

12:18:42 A. The exact day I believe it was -- I'm not going to remember off the top of my head when it was. It could have been shortly after the investigation began.

Q. And how soon after that meeting did Wage Hour receive the recording of the meeting?

12:18:56 A. It was -- it was a day or two later, I believe.

Q. And was this before or after you received the subcontractor agreements that we looked at in Exhibit 6?

A. This recording was made before we received the subcontractor agreements.

12:19:13 Q. How did that influence your review of the subcontractor agreements that you received?

A. Well, it affected it. It made me be suspicious. Once I was alerted to the fact that there was this plan to have the workers -- well, these workers were actually forced 12:19:29 to sign these agreements. Once I was alerted to the fact that there was this plan to create these subcontractor agreements and that they were -- they weren't really subcontractor agreements, that there were no dates and that they really weren't like any other subcontractor agreements. The 12:19:48 definition of subcontractor agreements really doesn't apply.

So then once I was alerted to this, once I did receive subcontractor agreements from the employer through Mr. Ross, you know, I did look at these. And the scrutiny that these received was -- I mean, probably it would have been the same if I hadn't known this. But it came to light that after reviewing the subcontractor agreements they were exactly as what was described in this, on this recording and exactly what was described by Mr. Williams when he was telling his employees what he was going to do. The subcontractor agreements had no dates on them. They did not describe any particular job site, didn't include any type of bid amount, any type of rules and regulations concerning any specific job site. It just did not look like a subcontractor agreement, like a normal subcontractor agreement. And the scrutiny was I immediately was able to recognize that these subcontractor agreements were what -- or my determination was that these subcontract agreements were what was being discussed in that conversation.

Q. Could you turn to those subcontractor agreements in Exhibit 6, please?

A. Yes, I'm there.

Q. Looking at the first subcontractor agreement for Mr. Erickson, is there a date at the top of this first page of the agreement?

A. Yes. 23rd of March 2009.

Q. So this would have been before your investigation in 2015?

A. Yes.

Q. The second page of that document, however, are the signatures in this agreement provided with any dates?

12:21:48

A. No. No dates on that signature.

Q. Does the existence of the date at the top of this subcontractor agreement on Page 1 change your analysis with regard to the veracity of this agreement?

12:22:07

A. No. Yes, I did state there were no dates on there. But, yes. There is this date. However, it's a beginning date. So this is when this date, this contract is signed. But the dates I'm referring to are the dates for the specific job. And in this case this date, if there is this date and this is the type of agreement that they're entering into begins on one day and there is no end to it so it would reflect sort of a permanency of the relationship. And that would sort of point to the fact that this wasn't a subcontractor agreement, that this is just an open-ended agreement that starts one day and never ends. And, therefore, you know, it would point to something that's not a subcontractor agreement.

12:22:27

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Q. With regard to this exhibit in particular from Mr. Erickson, do you know if the date of March 23rd, 2009, was the date that Mr. Erickson signed this agreement?

12:23:03

A. I do not know that. Looking at the document, I can't say yes or no to that.

Q. Do you have reason to question that it might be the date that this document was signed, however?

12:23:17 A. Yes, I do have reason to question that might be the date.

Q. And why is that?

A. Well, because of the -- first of all, there's no date near the signature with, you know, with that same 12:23:30 handwriting or same penmanship as the signature. And also because of the statements, the recording that in which Mr. Williams says that he's going to have these subcontractor agreements written up and that he wants all the employees to sign these subcontractor agreements.

12:23:49 Q. So the fact there that's a date on this document but that Mr. Williams stated in the recording that the documents would be undated, that doesn't change your analysis?

A. No.

Q. Why not?

12:23:59 A. Well, like I say, he did state in his in the meeting that the documents would not be signed -- sorry -- that the documents would not be dated. But the dates that he's referring to are simply, you know, dates for -- I mean, it's a little bit of a different date. I mean, this does have 12:24:21 a date on March 23rd. But again, that date, I believe, is just simply there to show that it started before the investigative period, so that this agreement was entered into before my investigation began. It may or may not coincide with the date that Mr. Erickson started working there. I don't really know. They didn't provide records for that. I did ask Mr. Erickson when he started working there, and I don't think I cross-referenced this date on there to his statement of when he began working for Mr. Williams.

But it would not change anything because, like I say, that's no date for the signature. And the subcontractor agreement would have, you know, beginning date and end date. And this, you know, even points to something that's not, you know, that would say this is not a subcontractor agreement.

Q. That same analysis that you did with regard to Mr. Erickson's subcontractor agreement, would that also be true for the other subcontractor agreements in Exhibit 6?

A. Yes. Although for Mr. Erickson it was a little bit different because I had the opportunity to speak with Mr. Erickson about this. He was one of the employees who I interviewed, and so I did get to speak to him about it.

THE COURT: We need to take our second break. Is this a good time?

MS. PRZYBYLSKI: It is, Your Honor.

THE COURT: We'll be in recess until 1:00. There is a cafeteria downstairs if you want to go down and get

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something.

MS. PRZYBYLSKI: Thank you.

THE COURT: We'll be in recess.

(Recess.)

THE COURT: You may proceed.

MS. PRZYBYLSKI: Thank you, Your Honor.

Q. BY MS. PRZYBYLSKI: Investigator Keith, before the break I had asked you a question about information that was contained on the recording of the meeting between Jason Williams and the workers about subcontractor agreements, and you had indicated that the workers, the content of that recording suggested that the workers were forced to sign those agreements; is that correct?

A. Yes. Obviously the language I used, I mean, I didn't see anyone as being forced to sign it. But, yes. From the content of that conversation the meeting that Mr. Williams presided over, there were pretty clear indications that the employees did not have a choice as to whether or not to sign these documents. I mean, it was presented as, you know, I've got these subcontractor agreements for you to sign. They will show this, that and the other. And then later, the discussion is, you know, do you guys still want to keep working, making money with me, things of that nature, that indicated that there was no choice. It wasn't -- it wasn't even addressed. I mean, not only did the employer not say you will have a

13:06:42 choice whether or not to sign this, but it was simply the language being used was basically that each employee would sign this. And I guess the question that Mr. Williams did ask was, do you still want to keep making money with me? And the implication that was inferred seemed to be that if you didn't, you know, want to keep making money with him, then fine. This was the point that you would, you know, not sign this document or something to that effect.

Q. So was it your understanding that signing the
13:07:00 document was a condition of continued work with Mr. Williams?

A. Yes. That's what I -- that was the impression that I received upon listening to the recorded conversation of the meeting of the recorded meeting.

Q. How could such a statement have an impact on the
13:07:17 Wage Hour investigation?

A. It could be profound. Obviously what the employer is suggesting the employees do and what was stated on the recording was that the employees were instructed to lie to an investigator. If they were asked when the document was signed
13:07:38 they were supposed to say, I don't recall, and things of that nature. Well, that's exactly, you know, if they were told that they should say that they don't recall.

And with that being the case, it would have a -- it could have a profound impact on the investigation in that I'm
13:08:03 not allowed to come to the proper conclusions, you know, from

a case based on what is being told to me by these employees who are told and forced to, actually coerced into making these statements and signing these documents. It could render the investigation. Let's just say if there hadn't been this recording, it could have a profound impact on the investigation in that I could not support the conclusions that I came to.

Q. Would a statement conditioning employment on an action of Wage Hour investigation, could that have an effect on the willingness of employees to talk to Wage Hour?

A. Yes. And that could -- and in addition to that, there seemed to be, I mean, he was saying if you were asked by a Wage Hour, he wasn't saying don't speak to the Wage Hour investigator, but it was, tell them this, that and the other.

Q. So it could also affect the content of the information that they provided?

A. Absolutely, they could.

MS. PRZYBYLSKI: I have no further questions of this witness at this time.

THE COURT: Thank you.

Mr. Ross, cross-examine the witness?

CROSS-EXAMINATION

BY MR. ROSS:

Q. Let's go backwards a little bit, Mr. Keith, while it's all fresh on our mind.

Earlier on you indicated that I believe in your testimony that the subcontracts that we're speaking about really didn't mean much as far as your investigation; is that correct?

13:09:50 A. I wouldn't use the words describing my testimony as me saying they didn't mean much. They meant a lot, actually.

Q. Can I rephrase it? Other than the documents not being valid documents and maybe not having correct signatures and no dates and things like that, the text of the 13:10:15 subcontracts didn't really affect or probably didn't have much of an effect on your investigation; is that correct?

A. Well, the text -- you're saying that it didn't have an effect on my investigation. I would say the opposite, that it did have an effect on my investigation. But the content 13:10:40 and the text of these subcontractor agreements led me to the conclusion that they were not valid and that they were, for lack of a better word, you know, not real subcontractor agreements.

Q. Okay. And I understand that. And I won't argue 13:10:57 with you on that. We've conceded that those were bad and we shouldn't have done it, and that's why we stipulated to an injunction after the client found out he shouldn't be doing things like that. So that was then and came later.

But I think the one point I was trying to make was, 13:11:15 that particular document, let's say it had been valid, would it have really affected your determination as to whether or not these folks were employees or independent contractors?

A. I would say absolutely, yes.

Q. It would affect you?

13:11:32 A. Okay. Well, I'll say it this way. If I'd been presented with, you know, a valid subcontractor agreement, then absolutely. I mean, the weight of a valid subcontractor agreement would certainly weigh heavily in my determination as to whether or not a worker was an employee or a subcontractor, 13:11:56 independent contractor.

Q. Well, it will be an element. But I think you earlier testified that this particular document had a lot of, I don't know what words to used, holes in it. It wasn't really determinative of whether that person would be a 13:12:10 contractor or subcontractor, and you went into some details talking about some of the bullet points. That's all I'm asking.

A. Okay. Yes. But again, I'm not exactly sure where you want me to go. I mean, I'm supposed to somehow envision 13:12:29 that this had been a valid document. Let's just say a subcontract agreement that looked like some of the others that I've seen come across in the last five years working as an investigator. Had that been the case, it would have had a severe impact. I mean, it would have impacted greatly on my 13:12:48 determination and my conclusion as to whether or not these employees were subcontractors or independent contractors or employees. I mean, the fact that, yes, this weighed on it, this did not change my -- these did not change my determination because of the text. But if it had been valid, if it did look -- I mean, if it had been valid, it would have weighed on it, yes. There would have been substantial weight given to that.

Q. Okay. That's fair enough. I appreciate that.

Now, you indicated that there was a trailer that transported tools from one site to another. You made inference that some of the tools belonged to Foreclosure Connection. Do you recall testifying to that?

A. Yes, I do.

Q. And you indicated that that trailer belonged to Foreclosure Connection?

A. Yes.

Q. Who told you that?

A. Mr. Erickson.

Q. Mr. Erickson told you that the trailer they were transporting tools was Foreclosure's?

A. Yes, sir. And if I could go a little bit further, actually, the conversation about that trailer was specific, and I remember it because I was under the impression -- I wanted to check and see if this was specifically one of those goods that employees were handling that had been manufactured out of state, and I asked Mr. Erickson about that. And he said, no, this trailer is owned by Foreclosure Connection. And he stated then that it was actually produced locally, that it was built here in Utah. That's what he stated. So I had them go and look for other goods that had been manufactured out of state or had been moved in interstate commerce.

Q. Okay. And one of the elements that you found for the interstate commerce was that some of the workers had tools, and you concluded that these tools had to have come from out of state; is that correct?

A. Yes. I mean -- yes.

Q. Okay. And that was your testimony. The tools that wound up in the, we'll call them the workers or employees, the workers that they used on the jobs, would they not be the ultimate user of those goods?

A. I mean, the ultimate user. That's not language I typically use. The ultimate user. Yes. They bought these tools for their own personal, you know, to be part of their equipment that they used to carry out their job, yes. And they're using this at a Foreclosure Connection job site, yes. The ultimate user, I mean, are they the ones? Yes.

Q. Okay. If I buy a tool for myself, a hammer, I don't care where it comes from, and I receive it under the FLSA, that would not be construed as interstate commerce item. It's a good that's excluded under Subsection (i), 203(i). Are you aware of that?

A. Without being able to look at those regulations off the top of my head, I couldn't say yes or no.

Q. Okay. So other than tools, what other items made these workers have been involved in interstate commerce individually, not as an enterprise?

A. What other items, like you're saying what other -- okay. Sheetrock. I had employees tell me that they, you know, put up sheetrock. Mr. Erickson said that he did electrical work. You know, he's wiring light fixtures like switches, things of that nature. There's also some framing that they were doing that I witnessed. Framing, you know, that involves possibly metal studs or wood, 2-by-4 studs. Nails. Possibly some screws. Possibly some anchors that go into the cement flooring, things of that nature.

Q. I was asking about, so are you saying that these items are something that the employees or the workers or themselves had brought them into the in commerce, or were they purchased by Foreclosure?

A. No. I mean, I wasn't saying that they moved them in interstate commerce. I mean, I'm simply stating that they were using tools and construction materials that had moved in interstate commerce. Now, I didn't specifically, you know, look at like the sheetrock or the 2-by-4 that was being used and determine that the 2-by-4 had moved in interstate

13:18:30

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13:19:45

13:20:04

commerce. I'm not saying that an individual went to Nevada to buy that and brought it here. That's not what I'm saying. I mean, what I'm saying, the determination that I'm making is that these individuals are involved in a trade and that they're using tools that could have and most likely did move in interstate commerce, and that some of the materials that they used on the job for to, in the home renovation projects, the property renovation projects, had looked at those products such as sheetrock or 2-by-4s or electrical wiring or maybe even some plumbing fixtures, a sink, that those items possibly and most likely had moved in interstate commerce.

Q. Okay. But you don't know that for sure; correct?

A. I did ask some employees about the tools that they had that they owned that they used on the job.

Q. Okay.

A. And they gave some names. I believe Makita was one of them. I want to say Skilsaw was another brand, I think someone mentioned that they used. And so Makita -- I did some research, and I've done some general research on it. Skilsaw I don't believe is based out of Utah, neither is Makita. And those are two items that come to mind.

Q. Okay. So these are, but these are the workers' tools?

A. Again, at that point, they may have been the workers' tools or they may have been -- I believe the saws that were mentioned, like a table saw, Makita table saw or a rigid saw, you know --

Q. Like the miter saw?

A. It might have been, yes. That those were typically owned by the employer. Miter saw or a chop saw, I guess is what you call a table saw is a little bit different. Table saw is a saw that comes up and slide things under. But shop saw and miter saw maybe and maybe a handsaw. But like the chop saw and the miter saw would have been items that were owned by Foreclosure Connection.

Q. Okay. And let's jump to the Barbers. What about the Barbers? Did they own, Mychal Barber own his own tools?

A. Yes, sir. He said he owned his tools. And he said, you know, all of his tools were his. I mean, he stated. Yes.

Q. Did he also indicate to you that he had a miter saw?

A. He did not.

Q. And did you -- before I forget, did you actually confirm whether or not Foreclosure Connection has its own tools?

A. To confirm that, I don't recall asking Jason Williams if he owned tools and what tools he owned. So any information I have as to the ownership of the tools would come from the workers that I interviewed, such as Jack Erickson and

13:22:08
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13:23:02
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the other individuals, the other employees, the other workers that I interviewed.

Q. In preparing for your testimony here today, did you get an opportunity to read through some of the depositions?

A. The interview statements that I took? Not the depositions, no.

Q. Okay.

A. No, I didn't. I started looking at some of the depositions that were taken and some of the answers Mr. Williams had given. But it was, I mean, it's a lot of material and I didn't have a chance to look at all the depositions that they gave. But my conclusions were based on the interview statements I took from them.

Q. Referring to -- you testified that Mr. Williams was ultimately responsible and he did -- he would tell Jack Erickson daily to tell the employees when and where and what work was expected and their shift times, and even Jack would even tell them when the day is over. Do you recall testifying to that?

A. Yes. I do remember speaking about that.

Q. What person did you interview that gave you that information?

A. I based that on interview statements in speaking with Mr. Erickson and in speaking with Mr. Barber, Mychal Barber, I should say. And there's also the information that was given to me by Mr. Erickson that's not in my interview statement, such as that might have been in passing in conversations, such as, yes, you know, I was told by Mr. Williams, you know, to show up at work -- I mean, yes. Okay. I'll leave it at that. I'll let you ask me the questions.

Q. Do you know whether or not Jack Erickson was told when and where to work by anyone?

A. Well, yes. Mr. Erickson told me that he got that information, those directions from Mr. Williams.

Q. Do you know how that was communicated?

A. No. I would think it was probably over the phone. Yes. I mean, and we had spoke about the telephone calls. Well, actually if Mr. Erickson told me that Jason Williams told me, you know, not to hire somebody or to tell him not to come to work for something like that, I didn't specifically say, was that over the phone or was that in a text message? But I did assume that since Mr. Erickson was on the job site and he worked a full day at the job site that he was not going back throughout the day to the office to get this information in person, but that it was transferred or relayed via telephone.

Q. Okay. And did Mychal Barber tell you how he got his instructions?

A. Yes. He said that when he was working with

Mr. Erickson he would get instructions from Mr. Erickson. When he was not working with Mr. Erickson he could get some from Mr. Erickson and some from Mr. Williams.

Q. Could you elaborate how he could get the same information from both?

A. Okay. If he was working with Mr. Erickson, he would get the direction, and this is my understanding, that he would get the direction from Mr. Erickson on what to work on. Mr. Erickson was in charge. Now, if Mr. Barber was not working a site where Mr. Erickson was, if he was working at a site where he was working at a site where Mr. Erickson was not, if he was off on his own, that he could get that information from two sources, either Mr. Erickson or Mr. Williams.

Q. And how would he get that information? How was it communicated?

A. You know, I didn't specifically ask that exact question. But if I was told, you know -- in some cases, yes, I recall some of the information, I specifically recall him saying they got a call from or they called Mr. Erickson and Mr. Erickson said, don't show up for work, or things like that. So specifically, I mean, I won't always ask, you know, okay. So Mr. Erickson gives you, tells you what to do. How does he do that? Does he do it in writing? Does he do it verbally? Does he do it over the phone? I don't -- a lot of times I don't ask those questions. The statements, the process is, it's stuff to do to write down all the statements. We don't have a stenographer there. So I have to limit the questions I have. I have to be somewhat limited.

13:26:56 Q. You also testified that you made a determination that Jason Williams was the sole employer. How did you come to that conclusion if -- not Sheffield, if Erickson is directing the Barbers a lot?

A. Yes. Okay. To address the Erickson issue,

13:27:22 Mr. Erickson would be what we refer to as a working foreman, okay? And how do I come to that conclusion? I come to that conclusion based on his testimony and the testimony of the other testimonies of the other workers that we interviewed.

So a working foreman would be someone who is in

13:27:39 charge. He's in charge of the crew. But he's in charge of like their work. He's not necessarily in charge of their time-off requests or their 401-K plan or their sick days or their some other items that might be considered human resources or personnel or someone in personnel might take care

13:28:03 of.

So he takes care, he's in charge of the day-to-day activities on the job in terms of what they do for work. In the morning after he pulls out the assignments to each individuals, he himself puts on the tool belt. I'm saying it

13:28:21 figuratively. He puts on his tool belt or grabs his tools and

13:28:38 13:29:01 13:29:21 13:29:40 13:30:04

he's working alongside of them. So he's there putting up sheetrock, and he's along side of them. That's where the term of working foreman comes from.

Now, working foreman certainly has, the definition of that, I mean, we would not even view that individual as being exempt of having been paid overtime. He would be a nonexempt employee. And so that would put him at one level. Now he's getting direction from Mr. Williams, and now Mr. Williams would be what we would refer to as a Section 3(D) employer. So we look and we see who's making the personnel decisions, who's setting the pay rates, who's in charge of the day-to-day activities of the firm, who's making the calls on the direction of the firm. You know, what properties are being bought? Which ones are being sold? I talked about this earlier. The personnel decisions in terms of, I may have gotten that from my discussions with Mr. Williams, that he set the pay rates for instance Jack Erickson and Mr. Barber, Mychal Barber, I should say, and even for the rest of the employees. But that seems to be the case. And Mr. Erickson did not take credit for setting any hourly wages.

Now, in addition to that, I mean, I did not have information, some of the owners that Mr. Williams said existed of Foreclosure and some of the other entities. I did not -- I was not given access to them. I was not provided records as to even, you know, the percentages of the ownerships. So to include anyone else as the 3(d) employer, I didn't have a lot of information that would have been helpful for me to include someone else in Section 3(d) employer. Not that that would change anything, anyway. Mr. Williams would be one of the employers. If some records had been provided, I might have simply included someone else who was also making the decision.

Q. But you don't know if any of these other owners were out asking people to do things on their own; correct?

MS. PRZYBYLSKI: Objection; vague.

THE COURT: Overruled. You can answer if you're able to.

THE WITNESS: At no point did any of the workers say anyone provided any guidance of the work except for Mr. Williams.

Q. BY MR. ROSS: I want to go to talking about selling property. You said you have an analysis of I guess money coming in and money going out in making a determination of what the gross of a company may be; is that correct?

A. When you say do I have an analysis?

Q. Yes.

A. I mean, yes. We have to determine what the annual dollar is. We need that for our investigation because we need to determine whether or not -- and that's usually given at the initial conference, because at that point that's when you make the decision on whether or not the investigation is going to continue or not. So it's one of the few questions, and it's usually maybe even the fifth or sixth question you ask aside from what's the name of the firm, who owns the firm. Actually it comes right then. How much money, what's the annual dollar volume in the last three years? That is up there. That's one of the first questions we ask in the initial conference.

13:32:02

Q. And when you asked Mr. Williams that question, what was his response?

A. He said, if I recall correctly, and this is going back for a long time, was that he was not exactly sure what -- and we usually go by the tax records. That's the easiest way, one of the easy ways for us to determine this. And so he said he could not recall what his gross revenue was for the years in question.

13:32:19

Q. Okay. And you say that one of the sources you use are the income tax returns; correct?

13:32:41

A. That's correct, yes.

Q. And in this case, do you recall your putting together your initial narrative on whether there was jurisdiction for the FLSA?

13:33:01

A. Right. Okay. Initial, it's just a narrative. It's one complete one.

Q. Okay.

A. And that comes at the end of the investigation. But I built it along the way. But I don't have to turn it in

13:33:13

until the investigation is concluded. But, yes, I do remember writing a narrative and addressing the section and writing the section where it addresses coverage and annual dollar amounts.

Q. And do you recall in that that you referred to the gross income for 2012 from the tax return being $65,000?

A. I'm not sure how I addressed it in the narrative, but I do remember looking, seeing that tax return that showed $65,000. Again, you're reminding me that it's $65,000. But, yes. I do recall there were two years where the gross revenue stated on the tax returns was below $500,000. And one was above that at $800-something-thousand.

Q. That's a good memory. It was 841,000. So basically why is that not determinative of what gross income or gross revenue is?

A. No, it was. It was certainly a factor, and I looked at it. And I mean, it was glaring right there, undoubtedly his gross revenue that he's stating to the IRS that his firm made in that year was less than $500,000. No escaping that.

Now, but then there was another factor in that, and it was a fact that Mr. Williams had stated that he bought and sold properties, and this came from our initial conference and I recall this specifically, the nature of the business was he bought and sold properties. So when they're buying and selling properties, and I'm questioning, I'm doing the questioning because at that moment he doesn't have the tax returns in front of him. So I'm trying to determine at that moment, it's going to take him maybe, some people, you know, it would take -- they've got to call their accountant. They've got to look at their files, something. He's sitting down at a meeting with me, and I'm trying to determine coverage, what the annual dollar amount is. So obviously he doesn't have the tax documents right there immediately available. So I'm using the tools that I have, which is asking questions about his income and annual dollar volume. And he stated that his business was to buy and renovate and sell properties and in some cases hold them, to manage them and to have them as rentals. And at that point, Mr. Williams, I asked Mr. Williams specifically, how much money do you think the sales, what are the prices of the properties that you sell in any given year? And his response was, is that the properties that he bought and sold in each year, the relevant years, was over $500,000.

So if he's buying and selling properties that are over $500,000 per year, that's the basis on which I came to the conclusion that the annual dollar volume of Foreclosure Connection was over $500,000.

Now, I mean, I took this even further. I asked my colleagues if they agreed with me and my superiors, and the feedback I got was that they agreed with me, my colleagues.

So that's when I felt comfortable enough making the determination that the fairly percentage that I applied for the entire investigative period and not just for the following four quarters after that one year where the annual dollar volume, it was stated the gross revenue was over $500,000.

Q. Do you have an accounting background, sir?

A. I took some college classes in accounting.

Q. Have you prepared tax returns before?

A. My own. I do them every year.

Q. And have you prepared a business tax return?

A. No; although my wife has done some independent work outside of her employer. And so by that nature, it was, I guess her serving as her own entity, her own business entity, and I filed the tax returns for that.

Q. Okay. But aside from that, do you know whether or not the accountant who prepared, the CPA prepared the tax returns for Foreclosure Connection and some of these other entities that we've included, MedPro and BPO and Triforce and several others, do you know whether or not he took into account, his name is Ted Schumm, if he took into account the buying and selling of these properties?

MS. PRZYBYLSKI: Objection; lacks foundation. And also objection to the relevance of this line of questioning.

THE COURT: Well, the question is, does he know. So that's a yes or no answer.

Do you?

THE WITNESS: No. I had no discussions about the accountant who prepared the taxes.

Q. BY MR. ROSS: So concluding other than Mr. Williams saying that, I buy a house for 500,000 and flip it, you know, fix it up and sell it, presumably he's going to -- the house is going to sell for more than $500,000. But if there's a mortgage against it, a cost and expenses against it, the money that they get, it's a cash basis business, is the income, the gross income. So if you pay 300 for a house and you owe 250 on it, your gross income is 50, not 300.

MS. PRZYBYLSKI: Objection; counsel is testifying.

Q. BY MR. ROSS: Do you understand that?

THE COURT: I think it's sort of a question.

Do you understand the question?

THE WITNESS: Yes, sir. Yes, sir, I do.

THE COURT: Go ahead.

THE WITNESS: Okay. Yes. I understand it, right. And I understand if you buy a house for $500,000 and you flip it and you sell if for 600, you're only making $100,000. But that's not annual dollar volume is. Annual dollar volume is not profit, it's not gross profit, it is not net profit. It is annual dollar volume. It's money that moves in and out of that business. And that's what we are trained to look for, and that's what we are trained to use for the purposes of whether or not the Fair Labor Standards Act applies for coverage.

Q. BY MR. ROSS: Okay. If -- and that's well and good if the Department of Labor wants to have that. But if you look at the definition of gross income, it's gross income, not volume in and volume out. That's a term of art in the accounting industry, that's the term that's used in the statute.

MS. PRZYBYLSKI: Your Honor, counsel is testifying. I object.

THE COURT: What is the question?

Q. BY MR. ROSS: Well, the question is, is he aware of that? Is he aware of statute?

THE COURT: Does he agree with it, or is he aware of it?

MR. ROSS: Is he aware of it.

THE COURT: The Fair Labor Standards Act?

MR. ROSS: Yeah. The Fair Labor Standards Act, and in particular Section 203(s).

THE COURT: Now, I'm going to overrule your objection.

MR. ROSS: Objection.

THE COURT: Let me explain it. You asked him a lot of questions about his understanding of the Fair Labor Standards Act acts and regs. And I think he's entitled to do

13:41:08
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the same thing. All right. Go ahead.

Q. BY MR. ROSS: So are you aware of the definition in the statute?

A. The statute in the actual -- I couldn't cite it for you exactly. And there may have been a time when I read it, but that may have been pushed aside from my understanding of what we're supposed to do based on my training, which is that for purposes, the annual dollar volume is not gross income. And I'm familiar with the term gross income, net income, gross profit, net profit. You know, I worked on Wall Street for a couple years. I'm familiar with these things. But, okay.

So I am familiar with the terms gross profit now. But if what you're asking me is, do I know what the definition is in Section 203(s), I would not be able to cite that for you without looking at it.

Q. BY MR. ROSS: Okay.

A. And again, I believe it's annual dollar volume as opposed to gross profit. And annual dollar volume is not gross profit, and we'll always been trained that it's not gross profit, that annual dollar volume is something different.

Q. Not gross profit, but gross income.

A. Correct. Yes. Annual dollar volume is not necessarily always gross income.

Q. Okay. Thank you. Do you recall interviewing

Mychal Barber on July 23rd, 2015? And actually if you look at Exhibit, the Defendant's Exhibit 10, A-10, it would be in a smaller, that's the government's.

A. A-10. Okay.

13:42:49 Q. It's the only way I can tell from here.

A. Okay. Sure.

A-10. Now the deeds are what I've got here for A-010.

Q. Yes. A-010 is correct.

13:43:10 A. Yes.

Q. Do you recall that interview?

A. Yes. I mean, yes.

Q. Is this document in your handwriting?

A. Yes.

13:43:22 Q. Is this what you refer to, your investigation notes?

A. Yes.

Q. Could you just read, this states at the top, it's got the date -- what's the date on the document?

13:43:40 A. 7-23-15.

Q. And do you have any reason to believe that is not the date that the interview took place?

A. No. No reason.

Q. It appears that you wrote, not fired. Do you see

13:43:54 that?

13:44:06

A. Yes, sir, I do.
Q. And just not invited back to work; is that correct?
A. Yes, sir.
Q. Is that information that you got from Mychal Barber?
A. That's probably -- that's me doing shorthand while the conversation is going on. Yes, sir.
Q. And then you've got, Mychal Barber used his own truck; is that correct?
13:44:20
A. Yes, sir.
Q. His own tools; correct?
A. Yes, sir.
Q. I think you testified that he did use his own tools.
13:44:27
A. Yeah.
Q. And I'm not sure I can read the next one. But there's a saw, Makita saw. Is this one of the ones that you're referring to that you would construe as being from out of state?
13:44:38
A. Yes. Concrete cutoff saw, Makita.
Q. Okay. And it looks like -- what's the next sentence? Would you read it, because I'm having a hard time?
A. Bought material at Home Depot. Gloves are one of the items that he bought.
13:45:00
Q. Okay.

A. And there was something else, but I didn't get a chance to -- I got a bullet point, but I didn't get a chance to write it down.

Q. Okay. Now, as part of your investigation, you indicated that you made a determination that as part of your determination of employment versus independent contractor that you made a determination that Foreclosure Connection did ask for or obtain the general contractor's license from Mr. Barber. Do you recall that?

13:45:22

13:45:51

A. Yes, sir. I remember testifying to that.

Q. And are you aware that one can just go online and find out whether a person's got a general contractor license or not?

A. I'm not in the business of hiring general contractors. But if you say that it's possible to do so, I would think it might be, although I'm not sure -- I mean, I would question whether the actual number, the license number would be on there.

13:46:07

Q. Would you look at A-7 or A-007?

A. Yes. Okay.

13:46:33

THE COURT: 7 or 8?

MR. ROSS: 7.

THE WITNESS: A-007, yes.

Q. BY MR. ROSS: And do you know what this document is or purports to be?

13:46:48

A. Yeah. I've seen similar documents. I mean, not necessarily a document, but it seems to be something that what someone would find if they were doing a search for someone online in terms of their business or something like that.

13:47:07 Q. Okay. And this appears to be a Mychal Scott, general contractor, LLC, document. Do you see that?

A. Yes, sir.

Q. Okay. If you'll look at A-005.

Have you seen this type of document before?

13:47:45 A. No. But I mean -- no.

Q. Do you know -- can you tell who issued this document?

A. It does say the State of Utah. It does look official. That's all I can really say.

13:48:01 Q. And if you look at Item 1, it says -- well, I don't have my glasses with me. Nature of the limited liability company -- name. I'm sorry.

A. The name. Mychal Scott General Contractors, LLC.

Q. And the purpose, Number 2?

13:48:24 A. Contractor's license.

Q. Are you aware, have you dealt with -- you indicated you do some work in the construction industry; is that correct?

A. I mean --

13:48:35 Q. Not work. Not as an employee as a contractor or

13:48:48
13:49:07
13:49:21
13:49:36
13:49:54

construction worker. But do you do investigations involving construction work?

A. Yes, sir.

Q. Okay. And have you ever seen anything like this before?

A. To that I would say, like I say, I have not seen documents that looks like this. However, if I did come across something like this in a packet of documents that I was handed during my investigations, I would read it and look at it, and I think I would be able to determine what it is.

Q. Okay. In your investigation, is it not true that you made comments to the facts that he was a general contractor?

A. Yes. I was aware of the fact that he did have a general contractor's license.

Q. And when he filed a complaint, did he file a complaint as a person that was a contractor?

A. Well, I believe when we spoke, I asked him about that. And he admitted that, yes, he had a general contractor's license.

Q. But the complaint he filed himself with the United States Department of Labor, when he filed his complaint, did he put down on that complaint that he was a contractor?

A. Well, there would be a time or place for him to do that. His complaint is me or an investigator or a technician interviewing him asking him questions. And from those questions his situation is vetted, it's a vetting process. So his situation that he's not content with in this case is vetted. To see if -- it does appear, let's just say he is a general contractor or he is not a general contractor, let's say he is an independent contractor or he's an employee. So we vet that and say, hey, what is this guy? Is this guy an employee? We have to go through the process to see whether or not the complaint is valid. So we have to vet whatever it is he's telling us.

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So in those instances, what we'll do is we'll ask a series of questions. And especially if he comes into the office, this process can take, I've sat down with people for two hours. And we will sit there and talk about everything concerning the job, the situation, the work that they're doing, the situations involving that work, the pay rates. All sorts of questions are asked.

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And I believe, I think it's in the statement, interview statement that I wrote down, that he was a general contractor, and he admitted so much to me. And this is where you had a couple questions. He then said, yes, I'm a general contractor, but I'm not working under my general contractor's license for Foreclosure Connection.

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And so with that information, I mean, I'm trying to vet this out. I'm trying to see if he's an employee. So with

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that, there's enough for me. I mean, and I simply take the complaint in this case. It's one of the jobs that we do. And I was the one who happened to take this complaint. But what's done with that complaint is not my decision. What's done with that complaint is up to the managers at a level above mine. They will then look at the information I took down from this person of questions that I asked him and the information that I have gathered and there's actually a form. It's -- I mean, there are certain questions that I have to ask, and there are other questions that are just follow-up questions that I asked. And through those questions, yes, I asked him if he was is a general contractor.

And I wrote down all of this down, and I passed that down to my manager. And my manager came to the conclusion that it was a valid complaint. At least there was certainly enough there to look into the possibility that this individual was an employee and was not being paid overtime and the child labor issues that we talked about.

Q. Do you ever take into consideration the laws of the state of Utah when it comes to contractors, contractor's licensing and what they can do and cannot do?

A. No, sir. Actually we're not trained on Utah laws. We know a little bit about them. But we cannot we don't enforce the Utah State laws, and, therefore, we're not trained in them. And it's probably for the reason they just don't want us getting involved in them whatsoever. So I do not enforce Utah state laws in any way, shape or form.

Q. But would it be a factor that Utah requires that a person that is doing construction work must be doing it under a license, a general contractor's license?

A. Possibly. But that's not really something I look at.

Q. Okay. But if you were aware of that, that it was unlawful to do otherwise, to employ somebody that, for instance, in this case, Jason Williams to employ a person to do construction work, that would be concerning to you if it's unlawful in the state of Utah?

A. Actually, if I see a law being broken that I'm aware of, and I mean, it's something I'm aware of, not something that simply might possibly be a violation. But I would bring that up to -- I mean we are trained, yes. I would bring that up to my manager, something like that.

But are you asking me if I was aware of this, that it's unlawful in the state of Utah?

Q. No. I think you answered that. That you were not aware of that, and that you don't enforce. And I understand that.

And my only question was, if you were aware, would that be a factor in whether or not Mychal Barber was an employee or an independent contractor?

A. And so if I were aware that Utah State had a law that said you could not employ, someone can't work on a construction site unless it's under a general contractor's license, if that would have an effect on this. I'd say no. But I don't think that I'm fully addressing what your question is and what you're trying to ask me, okay?

Q. Well, I wasn't asking you if you do an enforcement or you call the Department Occupational Professional Licensing and let them know or even bring it to your supervisor. But would it be a factor if you knew that Jason Williams as a matter of law cannot be the employer of a person doing construction unless he himself had a license?

A. It seems like bit of a hypothetical question. I'm not exactly sure how to answer that. I am aware --

THE COURT: You answer it if you can. If you can't, don't.

THE WITNESS: Okay. Yes. I mean, I guess it would. If that would somehow influence the determination, the question and the reasoning behind it determine whether or not Mychal Barber was an employee or an independent contractor, if there were any factors, I mean, I'm trained to look at those six factors. But, I mean, if there's something else that might shed light on that or in this case, you know, might affect one of the six items that, we look at, yes, absolutely, I would look at it. Absolutely. It would have an effect on it. If there was any indication that Mr. Barber was working as a general contractor, you know, under his license, it would have an effect, absolutely. And that's one of the reasons I asked him one of the questions, a question about that.

13:56:56 Q. I appreciate the answer.

One thing you addressed, and that was that you were requesting pay stubs, and that you indicated I believe that some of the folks and probably the Barbers had pay stubs; is that correct? Do you recall that testimony?

13:57:53 A. Yes. Yes.

Q. What is a pay stub?

A. A pay stub would be a document that accompanies the paycheck. And on that pay stub, there would be certain information that would correspond with that check. So, for 13:58:13 instance, a pay stub would have, for instance, you know, the amount. It would further explain what that check was about. It could be, you know, and we would hope it would have the number of hours worked and the total amount of the pay before taxes had been taken out.

13:58:34 Other than that, I mean, if it had the pay rate on it, that would be great. If it listed the taxes, I mean, there might be something, some other rule, it may be a state law that says, you know, taxes, you know, for a check, if you receive a paycheck, the amount of taxes that were taken out 13:58:56 would have to be listed there. I couldn't testify to that because I don't know.

Q. I believe you testified you did about 150 investigations?

A. Yes, sir.

13:59:06 Q. And in those investigations, did you have instances where the reported employer claimed to be -- not an employer, the folks working for him were independent contractors?

A. I've had investigations where employers did claim that certain workers were independent contractors. I never did have a -- this is the first case that I was involved in where an employer claimed that all of the workers were independent contractors.

Q. Okay. In some of those case that you were investigating, was there an ultimate decision that some of the folks that you were investigating did have independent contractors?

A. Could you repeat the question one more time?

Q. Well, in your 150 cases, were there some of the cases where the purported employer claimed that at least some of their folks were independent contractors and not employees, did you have instances where that became the final conclusion on your part?

A. Okay. If I could backup just a little bit. I want to clarify that may not be entirely true. I have done investigations where a company that is, for instance, a prime contractor and the prime contractor is in charge of a construction site building an apartment complex, and that prime contractor won't have any employees other than maybe the people at their office, but they won't have any employees working on the job site itself. In those instances they basically they are the prime contractor. And by the nature of being a prime contractor, they simply subcontract out every single job. So I have done investigations like that. But it's usually, even those, even for those prime contractors it usually involves an office. It's a firm. And every one in the office is not an owner. They've got someone doing, you know, writing up contracts. They've got someone doing HR. It's usually a fairly large firm or, you know, at least five people and they've got some employees.

14:01:24 I've never had an instance where there weren't any employees in that everyone is either an owner or an independent contractor. I've never had anything like that.

Q. Okay. Sorry. I took a lot of notes, and I'm having a hard time going through these. I apologize.

14:02:05 You indicated some knowledge relative to 1099s, and you had a general idea what they were for, and typically you might see there is an independent contractor. Are you aware that 1099s are not issued to everyone but only those persons that make $600 or more?

14:02:31 A. Now that you mention it, yes. I mean, I'm sort of

14:02:55 yes and no. I am aware of the 600. For instance, if I have a nanny or a maid or something like that. And if at one point there was a $600 threshold that I had to issue a 1099 personally for every worker, but then I think that only lasted for a little while and then that went away. So I don't -- so yes. I have heard of a $600 threshold. But I would think if you were an employer, you've got a lot of employees, I believe, yeah, that $600 threshold exists, yes.

Q. So not all of the people that were on some of those 14:03:21 lists would exactly, made a list of what some people were making and some of the people on that list did not make more than $600 a year so they would not have I think received a 1099, it didn't look. But my point being is, if you realize that, would that change your mind on trying to make this 14:03:44 comparison between the one list and, for instance, the 1099s that I gave to you?

A. Yes. But I'm not exactly sure what you mean by -- yes. I might deduce from that, okay, yes, not all the independent contractors made $600, so not all of the 14:04:05 independent contractors would have been given a 1099. But I don't think -- I only think the distinction we made with the lists were the lists didn't match up.

Q. Correct.

A. Okay.

14:04:17 Q. And I'm asking this in light of the fact that we

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did indicate that some of those subcontractor agreements were not valid. But there was reference to I believe in your testimony that or maybe raised a question as to why there was not a subcontractor agreement for all the listed people. I think in one of the lists you thought it might be 26 subcontractors. Another list it was obviously less. Do you know whether or not people could enter into an oral agreement that would be valid?

A. Outside of this job, I mean, yes. I mean, obviously yes. You can enter an oral or verbal agreement, yes.

THE COURT: How much longer do you think you need with this witness?

MR. ROSS: I think I'm going to be -- Your Honor, I'll try to hurry here.

THE COURT: Well, I'm not asking you to hurry if you don't want to hurry. I'm just asking, how long do you think you need?

MR. ROSS: Probably about 10 minutes. Is that going to be okay?

THE COURT: And you have redirect?

MS. PRZYBYLSKI: Yes, Your Honor, I do.

THE COURT: How long?

MS. PRZYBYLSKI: At this point maybe 20 minutes worth of questions.

THE COURT: Well, let's stop for the day. You can finish your cross in the morning.

MR. ROSS: Okay. That will be fine.

THE COURT: And redirect and recross. And hopefully most witnesses will not take this long.

14:06:28

MS. PRZYBYLSKI: I'm hopeful, Your Honor.

THE COURT: Yeah.

MR. ROSS: And I might be 15 minutes.

THE COURT: Well, I'm hoping the overnight doesn't lengthen in.

14:06:41

MR. ROSS: I know.

THE COURT: Thank you. We'll be in recess until 8:30 in the morning.

Be sure and come back.

14:06:58

THE WITNESS: Yes, sir, I will.

(Whereupon, the court proceedings were concluded.)

* * * * *

STATE OF UTAH)

) ss.

COUNTY OF SALT LAKE)

I, KELLY BROWN HICKEN, do hereby certify that I am a certified court reporter for the State of Utah;

That as such reporter, I attended the hearing of the foregoing matter on January 9, 2016, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages number from 1 through 170 constitute a full, true and correct report of the same.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal, this ____ day of _________ 2017.

____

KELLY BROWN HICKEN, CSR, RPR, RMR